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# Reason-Giving and Accountability

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## Article

# Reason-Giving and Accountability

Glen Staszewski<sup>†</sup>

I.	The Dominance of the Political Accountability Paradigm .....	1256
II.	The Implausibility of the Political Accountability Paradigm .....	1265
	A. The Absence of “Real” Political Accountability for Specific Policy Choices .....	1266
	B. The Limits of Partial, Proxy, and Direct Political Accountability .....	1271
III.	The Deliberative Accountability Paradigm .....	1278
	A. The Value of Reason-Giving .....	1279
	B. Distinguishing Deliberative and Political Accountability .....	1284
	C. Potential Objections .....	1287
IV.	Enhancing the Focus on Deliberative Accountability in Modern Public Law .....	1294
	A. The Need for a Paradigm Shift in Modern Public Law .....	1295
	B. Implications for the Structure of American Public Law .....	1302
	C. Implications for Individual Rights in American Public Law .....	1313

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## INTRODUCTION

Modern public law is strongly devoted to the notion that public officials should be held “accountable” for their decisions.<sup>1</sup> This is not surprising because the legitimacy of governmental authority in a democracy is often thought to depend upon the consent of the governed.<sup>2</sup> Although a very general form of democratic consent and political accountability is arguably achieved by holding periodic elections whereby a majority of voters select candidates to represent them for a fixed term in office, modern public law theory and doctrine have increasingly demanded more from these concepts.<sup>3</sup> Specifically, voters must be able to hold public officials accountable for their *specific policy choices* to ensure that those decisions are consistent with the preferences of a majority. Moreover, in what might be considered optimistically circular reasoning, modern public law typically presumes that elected officials *are* politically accountable for their specific policy decisions because they are selected and potentially removed from office by the voters.

This Article draws on recent interdisciplinary scholarship from law and political science, which demonstrates that the latter empirical presumption is simply not the case.<sup>4</sup> Public officials are not held politically accountable for their specific policy decisions pursuant to periodic elections, and there are overwhelming reasons to believe that this will never be the case. Moreover, in the absence of a reliable enforcement mechanism, modern public law’s efforts to legitimize government authority by connecting specific policy decisions to the will of the majority are bound to be misplaced.

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1. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (recognizing that “[t]he idea of accountability is very much in fashion in legal and political thought these days,” and that “the term is used in a variety of different ways”).

2. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 442 (1998) (explaining that under theories of popular sovereignty, “a regime is legitimate if people are made to follow only those rules to which they have consented”).

3. See *infra* notes 16–40 and accompanying text.

4. See *infra* Parts II, IV.A. For leading interdisciplinary sources on this point, see Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH* 45, 47 (Richard W. Bauman & Tsvi Kahana eds., 2006); and Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–29 (2004).

The Article turns to deliberative democratic theory to identify an alternative means of legitimizing governmental authority and holding public officials accountable for their decisions.<sup>5</sup> Specifically, it contends that individual policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives. Accordingly, public officials can be held *deliberatively accountable* by a requirement or expectation that they give reasoned explanations for their decisions that meet those criteria.

Legal scholarship on the concept of democratic accountability is surprisingly undeveloped in light of the importance of this topic for modern public law theory and doctrine.<sup>6</sup> Moreover, the best scholarship in this area tends simply to challenge existing assumptions or focus solely on questions of democratic theory.<sup>7</sup> This Article builds upon the existing work in a concrete and comprehensive way by connecting legal theory and doctrine, political science, and democratic theory on the concept of democratic accountability to question the prevailing status quo and propose an alternative way of thinking about the matter. Specifically, it (1) explains that modern public law theory and doctrine are currently dominated by a particular paradigm of political accountability; (2) demonstrates that the prevailing paradigm is empirically implausible; and (3) sets forth an alternative paradigm of deliberative accountability that is both more realistic and normatively attractive. Finally, the Article claims that the deliberative accountability paradigm should be made paramount and discusses the implications of doing so for public law theory and doctrine. These implications range from the elimination of the countermajoritarian difficulty, to the rejection of unitary executive theory and unduly formal methods of statutory interpretation, to a refined conception of judicial review of agency action, and to deep concerns about the legitimacy of the ballot initiative process. The Article closes by providing a tangible example of the implications of a paradigm shift in our understanding of democratic accountability for in-

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5. See *infra* Part III.

6. See Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755 (2004) ("Accountability . . . has gotten a fairly easy pass in the legal scholarship on democracy and constitutionalism.").

7. For outstanding contributions in each of these genres, see, respectively, Schacter, *supra* note 4, at 45–47, and AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

dividual rights that focuses on the controversy over same-sex marriage. The example illustrates that some legal or policy outcomes would change if there was an obligation to justify them on the merits, rather than by resorting to the alleged need to defer to officials who are “politically accountable,” which it turns out, upon examination, is typically false.

## I. THE DOMINANCE OF THE POLITICAL ACCOUNTABILITY PARADIGM

One can hardly read a judicial opinion in a controversial case or a law review article on a public law topic these days without encountering some rhetoric about the need for, or value of, democratic accountability. In judicial opinions, the standard technique is for decision-makers who uphold governmental action to justify their conclusions at least in part on the basis of the need to defer to choices made by democratically accountable officials.<sup>8</sup> This technique is invariably accompanied by a critique of any opposing judges for seeking to impose their personal preferences on the electorate, despite the democratically unaccountable status of the federal judiciary.<sup>9</sup> Similarly, it has become a truism in contemporary legal scholarship that policy decisions should be made by democratically accountable officials.<sup>10</sup> Any scholar who advocates a meaningful role for un-

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8. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 388 (1996) (“[J]udges occupy a unique and limited role, one that does not allow them to substitute their views for those in the executive and legislative branches . . . who have the constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions.”).

9. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting) (claiming that the FDA’s statutory authority to regulate tobacco should have been upheld, partly because the responsible administrative officials and their elected supporters would be held politically accountable for a policy decision of this magnitude); *Romer v. Evans*, 517 U.S. 620, 652–63 (1996) (Scalia, J., dissenting) (criticizing the majority’s decision to invalidate a policy choice by “the people of Colorado” on the grounds that “it [is] no business of the courts (as opposed to the political branches) to take sides in [a] cultural war” and claiming that the decision was “an act, not of judicial judgment, but of political will”).

10. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 (2003) (“Post-Bickel, scholars began to distrust not only judicial use of individual rights to invalidate popularly enacted statutes, but any policy decision made by unelected officials.”); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2 (2007) (identifying efforts to “minimize judicial intrusions into the political process” in different fields of modern public law in response to the core problem of justifying judicial authority in “a post-realist age . . . when judging is understood to be an active, creative enterprise”).

elected officials in making discretionary policy choices is therefore automatically on the defensive, because it is widely believed that such a position demands heightened justification.

Although the meaning of “democratic accountability” is deeply contested and increasingly debated in the social sciences,<sup>11</sup> legal scholars have devoted surprisingly little attention to the issue.<sup>12</sup> The vast majority of legal commentators have simply equated *democratic accountability* with *political accountability* and presumed that policy-making authority is most legitimately exercised by elected representatives of the people.<sup>13</sup> This Part describes the existing political accountability paradigm, explains how it is currently dominating every domain of contemporary public law, and describes the prevailing hierarchy of perceived institutional competence that has emerged.

It is important to recognize at the outset that the idea of political accountability could be understood to operate at two very different levels of abstraction. On a general level, political accountability simply means that the electorate has an opportunity to select a representative and decide whether to retain that person in office at the end of a specified term. General political accountability of this nature exists, by definition, whenever public officials must stand for election. Elections, moreover, are an essential element of democracy because they provide a means for achieving a peaceful and orderly succession from one governing regime to another,<sup>14</sup> in addition to allowing voters to protect themselves from abuses of power by their own representative government and ensuring that the existing leadership can plausibly claim to have the consent of the governed.<sup>15</sup> The general political accountability that is provided

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11. See, e.g., DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Przeworski et al. eds., 1999); PUBLIC ACCOUNTABILITY (Michael W. Dowdle ed., 2006). The latter volume includes some contributions by legal scholars.

12. See *supra* note 6 and accompanying text.

13. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532 (1998) (“The vast majority of theorists have failed to challenge [Alexander] Bickel’s basic assumption, that political accountability is the sine qua non of legitimacy in government action.”); *infra* notes 20–23 and accompanying text.

14. See Rubin, *supra* note 1, at 2077 (“One of the most important functions that elections do serve is to solve the problem of succession.”).

15. See Brown, *supra* note 13, at 565 (“Elections provide the people with an opportunity to punish [representatives] who have violated their duty by invading the liberties of the people.”). For a comprehensive development of this point, see *id.* at 565–71.

by elections is therefore undeniably central to democracy, but it does not tell us very much about the requisite link between the policy preferences of the voters and the specific policy choices of their elected representatives, or the extent to which specific policy decisions could legitimately be made by unelected public officials.

The prevailing paradigm of modern public law has moved beyond a concern with general political accountability and focuses instead on a perceived need to ensure that public officials are politically accountable to a majority of the electorate for their specific policy decisions. This extension of the requisite scope of political accountability is almost certainly a reflection of several related developments in legal and political theory.<sup>16</sup> First, legal realism demonstrated that most legal rules are the result of choices by authoritative decision-makers rather than objectively ascertainable truths.<sup>17</sup> Shortly thereafter, pluralism emerged as the leading theory of American democracy, whereby the political process was conceived as a marketplace in which selfish private interests compete for resources.<sup>18</sup> These intellectual movements combined to generate a newfound commitment to the principle of majority rule: if there is no objectively ascertainable "public good," and participants in the political process are merely seeking to satisfy their own subjective preferences, then the only legitimate way to make policy decisions that are binding on everyone is to follow the wishes of a majority of the citizens.<sup>19</sup> Governmental officials can therefore only legitimately make public policy decisions on behalf of the electorate if they implement the majority's preferences. Because public officials would otherwise have overwhelming incentives to stray

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16. See Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 66–68 (1989) (describing these developments).

17. For an iconic decision that signified acceptance of this view by the Supreme Court, see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

18. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 145–48 (1956) (discussing the role of special interest groups in the making of government decisions).

19. See Chemerinsky, *supra* note 16, at 68 ("If courts cannot discern true values, because none exist, and if majoritarian decisionmaking is the ideal, judicial review is nothing but the substitution by unelected judges of their values for those of popularly elected legislatures."); see also Brown, *supra* note 13, at 538–39 (documenting the historical development and recent dominance of "the majoritarian paradigm" in constitutional theory and explaining that for its adherents, "democratic government means that decisions affecting the polity will be made by accountable officials; anything else runs counter to the very defining principles of this nation").

from this obligation, voters must be able to hold them accountable for their specific policy choices.

Not only has modern public law extended its focus to a perceived need for specific political accountability, but contemporary public law theory and doctrine typically presume that elected officials *are* politically accountable for their specific policy decisions because they are selected and potentially removed from office by the voters. For example, Alexander Bickel famously claimed that judicial review is “a deviant institution” in American democracy because it allows unelected judges to invalidate the decisions of a popularly elected legislature.<sup>20</sup> The countermajoritarian difficulty, which has been the central obsession in constitutional theory for decades, is premised on a belief that elected officials are politically accountable for their decisions, while members of the federal judiciary are not.<sup>21</sup> Because discretionary policy decisions in a democracy should be made by representatives who are accountable to the electorate, the judiciary’s invalidation of congressional legislation (or executive action) on constitutional grounds appears anti-democratic. Although constitutional scholars have devised countless theories that seek to explain why meaningful judicial review does not necessarily conflict with democracy,<sup>22</sup> few commentators have even examined—much less challenged—the underlying assumption that elected officials are politically accountable for their decisions and that their policy choices are rendered legitimate on this basis.<sup>23</sup>

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20. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (Yale Univ. Press 2d ed. 1986) (1962).

21. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 630 (1993) [hereinafter Friedman, *Dialogue*] (“The countermajoritarian difficulty posits that the ‘political’ branches are ‘legitimate’ because they further majority will, while courts are illegitimate because they impede it.”); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) [hereinafter Friedman, *Academic Obsession*] (“For decades, legal academics have struggled with the ‘countermajoritarian difficulty’: the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy.”); Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 762 (2004) (“The idea that legislators are accountable and courts are not lies at the very heart of the countermajoritarian difficulty.”).

22. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

23. See Schacter, *supra* note 21, at 762 (“Despite the axiomatic character that Bickel and others seem to give this notion of accountability, constitutional scholars have barely scratched the surface in examining the quality and quan-



Moreover, the assumption that elected officials are politically accountable for their decisions has been extended to other areas of modern public law theory with similar ramifications. Thus, the prevailing theory of legitimacy in administrative law is the “presidential control model,” which “seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation.”<sup>24</sup> Because the President is the only nationally elected official in the American system of government, his decisions will presumably reflect the preferences of a majority of the electorate.<sup>25</sup> If the President nonetheless strays from the will of the people, he (or at least his political party) can be held accountable at the next election.<sup>26</sup> Accordingly, the legislature’s delegation of policy-making authority to administrative agencies, which would otherwise be difficult to square with the American constitutional structure, can be legitimized if agency decisions are subject to the control of the Chief Executive who is politically accountable to all of the nation’s voters.

The political accountability of the President has also provided a leading rationale for the judiciary’s deference to reasonable interpretations of ambiguous statutory provisions by administrative agencies. In *Chevron*, the Supreme Court explained that both agencies and courts are obligated to follow legislative intent when they implement a statute if Congress has expressly resolved the precise question at issue during the lawmaking process.<sup>27</sup> If, however, Congress did not directly ad-

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tity of political accountability that actually exists.”); *supra* note 13 and accompanying text.

24. Bressman, *supra* note 10, at 490.

25. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (arguing for “[a] unitary, nationally representative executive”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (describing how “presidential administration promotes accountability”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 91–106 (1994) (discussing the historical development of “presidential authority” with respect to administration agencies); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (“[I]t may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate.”). But see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (challenging the claims and implications of this literature).

26. See Bressman, *supra* note 10, at 491.

27. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

dress the precise question at issue, the judiciary should defer to a reasonable interpretation by the agency that was delegated authority to implement the program, rather than imposing its own construction on the statute.<sup>28</sup> While the Court relied upon the presumptive intent of Congress and the expertise of agencies, it also emphasized the superior political accountability of the President who exercises predominant control over the administrative state:

Judges are not experts in the field, and . . . must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is. . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."<sup>29</sup>

The judiciary's role in statutory interpretation is also strongly influenced by the assumption that elected officials are politically accountable for their decisions when *Chevron* deference is unavailable. The principle of legislative supremacy, whereby the judiciary is obligated to follow clearly expressed statutory mandates, is almost universally accepted in the American legal system.<sup>30</sup> One reason for the principle's popularity stems from its compatibility with conventional understandings of the legislative and judicial functions, which involve the enactment of generally applicable policies that are interpreted and applied in concrete cases or controversies.<sup>31</sup> The principle also draws much of its force, however, from the related notion that these institutional roles are mandated by a

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28. See *id.* at 843–44.

29. *Id.* at 865–66.

30. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) ("Our legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical and is embodied in the principle of 'legislative supremacy.'"); see also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 282 (1989) (defending a "weak" version of legislative supremacy that "precludes judicial policymaking only when a statutory directive is clear" (footnote omitted)).

31. See Farber, *supra* note 30, at 292–93 ("Because the supremacy principal is fundamental to our institutional framework, violations of the principal defeat justified expectations and impair legal stability.").

commitment to democracy because legislators—unlike judges—are politically accountable to their constituents.<sup>32</sup>

Contemporary public law scholars have generally concluded that the principle of legislative supremacy should be understood to require courts to serve as the “faithful agents” of Congress.<sup>33</sup> Moreover, the new textualists have claimed that a faithful agent of Congress is obligated to adhere to the plain meaning of statutory text based on the lessons of public choice theory and a proper understanding of the American constitutional structure.<sup>34</sup> The most devout proponents of this methodology have even concluded that it is illegitimate for the federal judiciary to deviate from a clear statutory text to exercise equitable discretion or to avoid absurd results in particular cases.<sup>35</sup> Among the purported goals of both the underlying methodology and its more extreme implications are to limit the policy-making discretion of the unaccountable judiciary and enhance the political accountability of the legislature when it exercises policy-making authority.<sup>36</sup> As is true of the other leading theories, the new textualism treats political accountability

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32. See Schacter, *supra* note 30, at 594 (“Fidelity to the legislature is thought to satisfy the demands of democratic theory by allowing popularly elected officials, presumed to be accountable to their constituents, to make policy decisions.”).

33. See, e.g., Frank H. Easterbrook, *The Supreme Court 1983—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (“Judges must be honest agents of the political branches. They carry out decisions they do not make.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) (“In a system marked by legislative supremacy (within constitutional boundaries), federal courts act as faithful agents of Congress.”).

34. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15–22 (2001).

35. See Manning, *supra* note 33, at 2387–91; John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, 2002, at 1, 2, <http://www.bepress.com/ils/iss3/art15/> (“[W]hen the statutory text admits of no ambiguity, then the results of that interpretation—absurd or otherwise—become irrelevant to the textualist.”).

36. See Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 (1999) (“[M]ethods like textualism . . . are best understood as efforts to improve the quality of the decisionmaking in the politically accountable branches.”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–29 (2006) (describing textualism’s efforts in “cabin-ing judicial leeway”); Schacter, *supra* note 30, at 642 (explaining that Justice Scalia’s approach to statutory interpretation reflects “his persistent suspicion that legislators are chronically tempted to pass off difficult choices of policy to others and that such behavior sabotages the project of electoral accountability”).

as the *sine qua non* of legitimate policy-making discretion in a democracy.<sup>37</sup>

The dominance of the political accountability paradigm in contemporary public law theory has (perhaps ironically) contributed to successful efforts to undermine representative democracy in recent years. If voters must be able to choose and control their elected officials and some degree of “agency slack” is endemic to this relationship, democratic accountability would only be strengthened by allowing voters to make policy decisions directly. Thus, the use of the ballot initiative process, which is routinely characterized as “lawmaking by the people,” has skyrocketed in recent years at the state and local levels partly as a result of widespread frustration with the traditional legislative process.<sup>38</sup> Given the prevailing understanding of democratic accountability, it is not surprising that this form of lawmaking is frequently praised “as democracy in its purest form, as the closest we can come to genuine popular sovereignty.”<sup>39</sup> Indeed, if direct democracy is lawmaking by the people, successful ballot measures would arguably embody the consent of the governed and thereby achieve democratic legitimacy without the need for “accountability” that arises from the delegation of lawmaking authority to an agent of the people.<sup>40</sup>

An examination of the dominant schools of thought in the fields of constitutional theory, administrative law, and legislation reveals the establishment of a broader hierarchy of per-

37. See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 9–10 (2004) (claiming that “tenure” provides “a powerful reason not to allow judges to make policy” in a representative democracy because “[w]hen judges make policy—which is, after all, what discretion in interpretation means—you can’t get rid of them”).

38. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 412–20 (2003) (describing the typical perception of direct democracy and its increased use in recent years).

39. Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 151 (1995) (citing *In re Estate of Thompson*, 692 P.2d 807, 808 (Wash. 1984)). Although direct democracy has been criticized for other reasons, the ballot initiative process is typically considered above reproach on grounds of democratic accountability. See Bernard W. Bell, *Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 233 (2003) (“The apotheosis of accountability is the plebiscite, and other forms of direct democracy.”).

40. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1477 (2000) (“Accountability, of course, would not be an issue in a direct democracy, in which every citizen participated directly in making laws.”).

ceived institutional competence that corresponds with the perceived political accountability of its actors. Thus, lawmaking by the people through the ballot initiative process is the "ideal" form of decision making in a democracy.<sup>41</sup> Because this process is not always practical or available, public officials will still need to make countless important decisions.<sup>42</sup> A broad consensus has recently emerged that those decisions should preferably be made by a chief executive who is politically accountable to all of the nation's voters.<sup>43</sup> Although the executive branch may not contravene a constitutionally valid legislative mandate, statutes typically cannot be enacted without the executive's assent, and substantial enforcement discretion is preserved after a bill becomes a law.<sup>44</sup> Moreover, there is widespread debate about the scope of the constitutional limits on Congress's authority to direct or constrain the activities of the executive branch and whether the President has independent authority to implement his understanding of the Constitution outside the courts.<sup>45</sup> The dialogue on these subjects suggests that many, if not most, public law scholars would place the Chief Executive

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41. See Clark, *supra* note 2, at 437 ("The populist case for direct democracy is straightforward and appealing: direct democratic processes are at some level more democratic, more legitimate, than representative institutions, because they are more directly responsive to the people."); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513 (1990) (recognizing that if "[m]ajoritarian democracy . . . is the core of our constitutional system . . . the plebiscite certainly seems to have a strong claim to being its most treasured instrument").

42. Most significantly, the American Constitution prohibits direct democracy at the federal level. See U.S. CONST. art. I, § 1.

43. See Cynthia Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987-88 (1997) (recognizing that courts and commentators have increasingly looked to the President "to supply the elusive essence of democratic legitimation" in the modern regulatory state because "[t]he President, and the President alone, represents the entire citizenry" and is therefore uniquely situated "to infuse into regulatory policymaking the will of the whole people"); *supra* notes 24-29 and accompanying text (describing the perceived political accountability of the President).

44. See U.S. CONST. art. I, § 7; Heckler v. Chaney, 470 U.S. 831 (1985) (holding that non-enforcement decisions are presumptively immune from judicial review under the APA).

45. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360-62 (1997) (describing the arguments in support of executive non-deference to Supreme Court constitutional interpretation, but arguing for the primacy of judicial interpretation); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343-45 (1994) (concluding that the President should have the power to review the decisions of the judicial and legislative branches).

one position above the legislature in this particular hierarchy. Administrative agencies, which were traditionally viewed as constitutionally suspect, have been legitimized (and, in effect, promoted to a position just below that of the legislature) in contemporary public law theory by the political accountability of the President who controls the modern administrative state.<sup>46</sup> In any event, the independent judiciary plainly sits at the bottom of this institutional hierarchy and, indeed, modern public law can be understood as nothing more or less than an effort to ensure that the judiciary is appropriately deferential to these other politically accountable decision-makers.

## II. THE IMPLAUSIBILITY OF THE POLITICAL ACCOUNTABILITY PARADIGM

Modern public law typically presumes that elected officials are politically accountable to the voters for their specific policy decisions. President Bush and the Environmental Protection Agency would therefore presumably be accountable for the agency's decision to transfer its permitting power to officials from Arizona under the National Pollution Discharge Elimination System without determining whether this course of action would jeopardize a protected species under the Endangered Species Act.<sup>47</sup> Similarly, federal lawmakers would presumably be accountable for their decision to prohibit the knowing performance of the intact dilation and evacuation procedure for terminating a pregnancy regardless of whether a medical professional determined that this procedure was necessary for the preservation of the mother's health.<sup>48</sup> Federal lawmakers would also presumably be responsible for their apparent decision to require the Secretary of Education to calculate the per pupil expenditures of local school districts in a particular fa-

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46. See *supra* notes 27–29 and accompanying text (discussing *Chevron*); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (“[N]o matter how ‘important, conspicuous, and controversial’ the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” (citation omitted)).

47. See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2521–22 (2007) (5–4 decision) (reversing the Ninth Circuit’s conclusion that the transfer of power was arbitrary and capricious in violation of the APA).

48. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1632 (2007) (5–4 decision) (rejecting a facial challenge to the constitutional validity of the Partial Birth Abortion Act of 2003).

shion under the Impact Aid Program.<sup>49</sup> Judicial decisions to invalidate these actions or to deviate from the plain meaning of the governing legal texts would therefore illegitimately substitute the court's policy preferences for the apparent will of the people.

For this form of political accountability to work, however, it would be necessary for the electorate (1) to know about the government's decision; (2) to have an established preference about its desirability; (3) to be capable of identifying who was responsible for the decision; and (4) to vote on the basis of this information at the next election. One need not be a rocket scientist—or even a political scientist—to realize that this set of conditions will only be satisfied in the most extraordinary of circumstances.<sup>50</sup> In short, the presumption that elected officials are politically accountable for their specific policy decisions is wildly unrealistic. This ideal is therefore typically either a formality or a fiction, but it is not meaningful enough, in reality, to carry the massive weight that is placed upon it by modern public law theory. This Part draws upon recent interdisciplinary work in law and political science by Jane Schacter and others to explain why this is the case.

#### A. THE ABSENCE OF “REAL” POLITICAL ACCOUNTABILITY FOR SPECIFIC POLICY CHOICES

The fact that most citizens lack even basic political knowledge has been almost universally accepted by political scientists for decades.<sup>51</sup> For example, survey data has repeatedly

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49. See *Zuni Pub. Sch. Dist. No. 89 v. Dept. of Educ.*, 127 S. Ct. 1534, 1536–37 (2007) (5–4 decision) (upholding the Secretary's approach on the grounds that it reflected a reasonable interpretation of an ambiguous statute). *But see id.* at 1551 (Scalia, J., dissenting) (claiming that the Secretary's interpretation was contrary to the plain meaning of the statute and the majority's decision was “nothing other than the elevation of judge-supposed legislative intent over clear statutory text”).

50. I must confess that I am not the first “comedian” to use this specific joke. See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1729 n.110 (2002). I have no serious ambitions, however, of being the last comic standing.

51. See ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA* 17 (1998) (“The claim that citizens lack political information has a long and respected history.”); Schacter, *supra* note 4, at 47 (“It is an article of faith among political scientists that citizens are woefully uninformed about politics, and scholars have rarely resorted to understatement in characterizing the public's knowledge gaps.”); Somin, *supra* note 4, at 1304 (“The most important point established in some five decades of political knowledge research is that

shown that many citizens are unaware of the identity of their elected representatives, which political parties are in control of major public institutions at any given time, and which public officials or institutions are responsible for various governmental functions.<sup>52</sup> Many voters fail to understand basic ideological concepts, such as the meaning of “liberal” or “conservative.”<sup>53</sup> Perhaps most important for present purposes, most American citizens know “virtually nothing” about the specific policy issues that are resolved by their elected representatives.<sup>54</sup> Under these circumstances, it is implausible to believe that a significant percentage of voters would be familiar with any more than a handful of the thousands of policy decisions that are made by the President, members of Congress, or administrative agencies during the course of an election cycle.<sup>55</sup>

If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution. Moreover, political scientists who study public opinion have questioned whether the electorate has preexisting or fixed preferences on many of the issues that *are* brought to its attention.<sup>56</sup> For example, the results of public opinion polls frequently depend upon how questions are

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the majority of American citizens lack even basic political knowledge.”). For the leading work of political science on this subject, see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996).

52. Somin, *supra* note 4, at 1304–06, 1316–17.

53. *Id.* at 1305–06.

54. See, e.g., John A. Ferejohn, *Information and the Electoral Process*, in *INFORMATION AND DEMOCRATIC PROCESSES* 3, 3 (John A. Ferejohn & James H. Kuklinski eds., 1990) (“Decades of behavioral research have shown that most people know little about their elected officeholders, less about their opponents, and virtually nothing about the public issues that occupy officials from Washington to city hall.”).

55. See Schacter, *supra* note 4, at 47 (explaining that “[v]oters cannot hold legislators responsible without sufficient information about what legislators have, in fact, done” and that the necessary “information consistently eludes the electorate”); see also Jane S. Schacter, *Accounting for Accountability in Dynamic Statutory Interpretation and Beyond*, *ISSUES IN LEGAL SCHOLARSHIP*, 2002, at 1, 13, <http://www.bepress.com/cgi/viewcontent.cgi?article=1024&context=ils> (explaining an inability “to find any studies looking in any detail at the levels of citizen awareness of legislation written and passed by legislators” with the hypothesis that the public’s lack of “specific information about legislation . . . seems too obvious to warrant study”).

56. See Schacter, *supra* note 4, at 59–63 (canvassing political science literature on how public policy is formed and identifying “problems with the ability of candidates . . . to reliably identify the content or strength of public attitudes on key issues”).



posed because respondents often have no preexisting views on the underlying policy issues and essentially make up their answers on the spot.<sup>57</sup> Politicians and interest groups can therefore potentially construct or manufacture “public opinion” that supports their preexisting policy preferences or use favorable polling data from independent sources to move public opinion further in their favored direction.<sup>58</sup> To the extent that majoritarian preferences cannot truly be identified and followed by conscientious elected officials, but rather are “crafted” by public officials and other elites for their own purposes, the majority’s will cannot serve as the autonomous constraint on—or focus for—decision making by elected officials that is contemplated by the political accountability paradigm.<sup>59</sup>

Assuming that a substantial percentage of voters was aware of a particular governmental decision and had formed true preferences on the issue, the electorate would still need to be able to determine who was responsible for the decision to hold those officials politically accountable. This is not necessarily an easy task for a sophisticated observer of a federal system of government with separated powers and a host of checks and balances.<sup>60</sup> For example, an environmental activist who was upset about the inadequate protection of endangered species in Arizona could plausibly object to policy decisions by Congress, President Bush, EPA officials, Governor Napolitano, officials from the Arizona Department of Environmental Quality, and the United States Supreme Court.<sup>61</sup> Moreover, the survey data shows that deficiencies in voter knowledge are particularly acute with respect to information that is relevant for assessing

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57. JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 76–80 (1992).

58. See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON’T PANDER* 112, 115, 119–20 (2000) (describing how the Clinton White House tried to influence public opinion about health care reform through analyzing polling data and other methods).

59. See Schacter, *supra* note 4, at 62–63 (describing recent political science literature that questions “the notion that the public has extant views that are tapped into by challengers or reporters who draw attention to incumbents’ votes,” and explaining that “public opinion may be a considerably more top-down affair, one in which politicians (among others) actively try to shape and sway public opinion”).

60. See *id.* at 47 (“[S]orting out who is responsible for particular public policies is formidably difficult in the context of a multimember legislature, multibranch government, and federal system.”).

61. See *supra* note 47 and accompanying text.

who is responsible for particular governmental decisions.<sup>62</sup> Not only is the difficulty of accurately attributing blame for unpopular governmental decisions a seemingly undisputed fact of modern political life (that is, of course, facilitated by some of the actions of public officials), but the need to improve the ability of citizens to make these determinations has been explicitly recognized by courts and commentators in a variety of different contexts.<sup>63</sup>

Finally, the contemporary understanding of political accountability presumes that voters have the capacity to sanction a deviant public official for an unpopular decision. This presumption is undermined on several different levels by the realities of modern elections. First, public officials are sometimes precluded by term limits from seeking reelection.<sup>64</sup> Second, incumbents are increasingly shielded from viable competition by the composition of their electoral districts.<sup>65</sup> Third, there is an ongoing debate in the political science literature regarding whether voters use elections as opportunities to sanction incumbents for their prior decisions, as opposed to selecting the best available representative for an upcoming term.<sup>66</sup> Although voters probably take into account both types of considerations, it is certainly possible for incumbents who have made some very unpopular decisions to be reelected. In any event, even if voters based their decisions primarily on the past performance of their elected representatives, the combined effect of the large

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62. See Somin, *supra* note 4, at 1315 (“[P]ast studies have repeatedly found that citizens have, at best, a very limited knowledge of how authority over issue areas is distributed in our complex political system.”).

63. These include federalism decisions by the Supreme Court, see *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), as well as arguments in favor of reviving the nondelegation doctrine and adopting the theory of the unitary executive in constitutional law and strictly adhering to formal methods of statutory interpretation. For prominent examples of each these respective arguments, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 99–106 (1993); Calabresi, *supra* note 25, at 42–45; and Manning, *supra* note 33, at 2437.

64. See U.S. CONST. amend. XXII.

65. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623–30 (2002) (describing the relation between increased gerrymandering and incumbent reelection rates); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 59–64 (2004) (explaining how gerrymandering has increasingly lowered the level of competition in political races).

66. See Schacter, *supra* note 6, at 758–59 (explaining that “the very idea of accountability uncritically assumes a retrospective focus” that implicates the debate in political science between the “selection or mandate view” and the “sanctions or accountability” view of voter behavior).

number of policy decisions that are made by every public official and the limited number of candidates for a particular office means that an election will necessarily be an exceedingly blunt and ineffective instrument for the expression of voter preferences on specific policy issues.<sup>67</sup>

In sum, it is clear that neither the Chief Executive, legislators, nor bureaucrats are politically accountable for their specific policy decisions in the manner that is contemplated by the prevailing paradigm in modern public law theory. First, the Executive Office of the President makes countless decisions that are invisible to the electorate, and even the relatively small number of decisions that receive some public attention are not necessarily salient to a majority of voters. Moreover, White House officials undoubtedly play a major role in a host of governmental decisions that are never attributed to the President. Even if a first-term President made numerous unpopular decisions that were transparent, American voters would still only be presented with one reasonably viable alternative. Finally, the President is not eligible for reelection after his second term, and he makes far too many decisions, in any event, for electoral sanctions realistically to come into play on any regular basis.

The bulk of Congress's decisions receive even less public attention and arouse even less public interest than those of the President. Even when major actions by the entire body or a single chamber become salient to the general public, the voting decisions of individual members will routinely escape notice or be subject to conflicting interpretations. More generally, the collective nature of an ongoing, multimember institution that is subject to the requirements of bicameralism and presentment can make it difficult to ascertain who, if anyone, was responsible for any particular outcome. Although federal legislators are not subject to term limits, congressional elections are often less competitive than presidential races and even in closely contested races, most of the specific policy decisions of an incumbent will play little if any role in the outcome.

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67. For descriptions of this "bundling" problem, see Farina, *supra* note 43, at 998 ("[Bundling] precludes any facile translation of election results into 'the people's will' on specific policy issues . . ."); and Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197-200 (1994) (describing the limited role of policy considerations in presidential elections).

Similarly, administrative agencies occasionally make highly visible policy determinations, but the vast majority of regulatory decision making flies beneath the general public's radar and implicates established preferences of the electorate only at very high levels of abstraction. Not only are most voters unlikely to know or care about most administrative decisions, but they will routinely have difficulty accurately gauging responsibility for those decisions that subsequently prove unpopular. While some of the highest profile agency decisions might occasionally be attributed to the President, all of the limitations on his political accountability would exist in this context as well.<sup>68</sup> Accordingly, President Bush, for example, cannot be held politically accountable for the federal government's inept response to Hurricane Katrina since it happened during his final term in office.

#### B. THE LIMITS OF PARTIAL, PROXY, AND DIRECT POLITICAL ACCOUNTABILITY

It seems indisputable that public officials are not really politically accountable to the electorate for most of their specific policy decisions. This is particularly true of the vast majority of routine or technical policy determinations, such as whether to transfer the EPA's permitting powers to state officials without assessing the impact on endangered species, or whether to allow the DOE to consider student population in calculating the

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68. The administrative law literature on this topic tends to focus on the question of whether agency officials are "accountable" to their political principals. The basic theory is that if elected representatives are accountable to voters, and agencies are, in turn, accountable to elected representatives, then agency decisions have democratic legitimacy on the grounds that they are sufficiently responsive to the preferences of citizens. *See, e.g.,* McNollgast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1663 (A. Mitchell Polinsky & Stephen Shavel eds., 2007). My primary claim in this Article is that elected representatives are not politically accountable to the voters for their specific policy decisions. Accordingly, the "chain of accountability" that is envisioned by such theories of bureaucratic legitimacy is broken, and agency decisions cannot plausibly be connected to the will of the people on this basis. The extent to which agency decisions are controlled by elected officials is therefore beyond the scope of this Article. Nonetheless, to the extent that agency decisions are controlled by elected officials and elected officials are not politically accountable to the voters, the "logic of collective action" would suggest that this form of political control will be affirmatively problematic in the absence of other mechanisms for holding public officials accountable for their decisions. *See id.* at 1714 ("If elected officials are a willing co-conspirator in agency capture, evidence that they influence policy will not assuage fears that the public interest is subverted.").

per pupil expenditures of local school districts. The same conclusion would not necessarily hold, however, with respect to a small number of “momentous” or culturally significant decisions—such as whether to prohibit “partial birth abortions” or regulate greenhouse gas emissions from new motor vehicles to limit the pace of global warming.<sup>69</sup> It is therefore worthwhile to pause for a moment to consider the nature and degree of political accountability for this much narrower category of policy choices.

The primary difference between the routine and the momentous for purposes of political accountability appears to stem from the increased likelihood that voters will find out about a “momentous” policy decision and have—or at least develop—an established preference on the issue. There are, however, still reasons to doubt that elected officials are regularly held politically accountable even for their most visible policy choices. First, there may be ongoing difficulties associated with accurately identifying who is responsible for a particular policy decision. For example, the EPA argued that it lacked statutory authority to regulate greenhouse gas emissions from new cars under the Clean Air Act,<sup>70</sup> which would presumably have shifted responsibility for the failure to counteract global warming from the executive branch to Congress. Moreover, the voting decisions of individual members of Congress on the Partial Birth Abortion Act of 2003 might not be known by, or accurately conveyed to, the general electorate, even if voters wanted to use this information as the basis for their reelection decision. One well-known study reported, for example, that less than twenty percent of survey respondents could identify a single vote by their representative in the House over the preceding two years.<sup>71</sup>

Second, if voters accurately identified who was responsible for a momentous policy decision, those public officials might not face any political consequences. For starters, voters who favored a ban on “partial birth abortion” *and* efforts to combat global warming (and, say, strongly oppose the war in Iraq *and* same-sex marriage)—that is to say, an apparent majority of American citizens—may be facing difficult choices at the time

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69. See *Gonzales v. Carhart*, 127 S. Ct. 2518, 2521–22 (2007); *Massachusetts v. EPA*, 127 S. Ct. 1438, 1440–41 (2007).

70. *Massachusetts v. EPA*, 127 S. Ct. at 1450.

71. See George F. Bishop et al., *What Must My Interest in Politics Be If I Just Told You “I Don’t Know”?*, 48 PUB. OPINION Q. 210 (1984).

of an election. In any event, President Bush is not subject to electoral accountability for any of his second-term decisions. Legislators with safe seats are in essentially the same position, at least as long as they adhere to their party lines on issues of this nature.<sup>72</sup>

The fact that there is a party line on issues of this nature may further limit the electoral consequences of an incumbent's specific policy decisions because many of the voters who know and care about their resolution are inclined to vote for the party line as well. The net effect may be that (1) committed Republicans oppose partial birth abortion and regulation of greenhouse gases and vote in favor of Republican candidates; (2) committed Democrats proceed in precisely the opposite fashion; and (3) contested elections are decided by "the median voter." Yet, the median voter is the median voter largely because she does not necessarily have fixed or consistent preferences on issues of this nature. Accordingly, the median voter should be interested to know that the failure to adopt an exception for the preservation of the mother's health provided a constitutional and policy basis for opposing the Partial Birth Abortion Act of 2003, even for representatives with stated objections to the procedure. Because a competitive election could, in theory, be influenced by whether this type of information was accurately conveyed to voters, candidates for office (and their allies) have powerful incentives to distort the voting records of their opponents. At the end of the day, it seems doubtful that median voters have sufficient information about momentous policy decisions to adopt fully informed preferences on those issues—much less that they make electoral decisions on that basis. Rather, because most policy issues are complex and election campaigns are not conducive to reasoned (or even candid) deliberation about their details, most voters base their election decisions on information shortcuts or cues that simplify the task of choosing the preferable candidate in light of all of the potentially relevant considerations.

It is conceivable, perhaps, that these information shortcuts could compensate for the large gaps in the electorate's political knowledge and thereby provide a form of "proxy accountability."<sup>73</sup> Political scientists have recently claimed that voters can,

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72. Cf. Schacter, *supra* note 4, at 66 (pointing out that primary elections may be "the more important elections in contemporary politics" in light of "the prevalence of safe seats in Congress").

73. See *id.* at 50 (examining whether recent work in political science

in fact, make rational decisions based on limited information if they are exposed to simple cues that tell them, for example, what better informed individuals or groups think about the matter in a context that allows voters to assess the trustworthiness of the speaker.<sup>74</sup> The idea is that if voters can accurately decide which candidates they prefer based on party labels, endorsements, or other simple cues, elected officials could be held politically accountable in a manner that comports with modern public law theory.<sup>75</sup>

The scholars who have examined this precise question have persuasively concluded that although information shortcuts of this nature can be helpful, their potential availability does not establish that elected officials are politically accountable to the voters for their policy decisions. Many voters have insufficient political knowledge to use information shortcuts effectively, and in the absence of the requisite background information, voting cues of this nature can be affirmatively misleading.<sup>76</sup> The use of information shortcuts is also likely to entrench existing social inequalities and create substantial risks of voter manipulation because of the biased nature of many of the sources, the reductionist nature of persuasive political argumentation, and systemic disparities in political knowledge that render some citizens more reliant on lower-quality information.<sup>77</sup> Finally, the available voting cues are far too general and haphazard to enable voters to hold elected officials politically accountable for their policy decisions based on this information.<sup>78</sup> For example, voters often rely upon the performance of the national economy in presidential elections, and a

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might provide a basis for “proxy theories of accountability by identifying substitutes for the kind of informational environment that might make actual accountability possible”(emphasis omitted)).

74. See, e.g., LUPIA & MCCUBBINS, *supra* note 51, at 64 (explaining that concepts like reputation, party, or ideology are useful heuristics if they convey information about knowledge and trust).

75. See Schacter, *supra* note 4, at 51–52.

76. See Somin, *supra* note 4, at 1320–23; see also Schacter, *supra* note 4, at 64–65 (recognizing that “[v]arious scholars make the basic point that it is difficult for voters to use shortcuts well when they lack the necessary background knowledge to make sense of the shortcuts themselves,” and observing that “[t]herein lies the paradox: The voters arguably most in need of cues are also those least able to make good use of them”).

77. See Schacter, *supra* note 4, at 66–68.

78. See *id.* at 65–68.

heavily used voting cue in House elections is the name recognition of an incumbent who is running for reelection.<sup>79</sup>

Similar fundamental problems also undermine the possibility that political accountability could consistently be achieved by the need for politicians to predict how their constituents would react to a policy decision if it were brought to their attention.<sup>80</sup> In this regard, political scientists have argued that the electorate's lack of information about politics can be overcome by the fact that elected officials must anticipate the preferences of their constituents to avoid making decisions that could be used against them in future elections.<sup>81</sup> If this is the case, then elected officials might be responsive to the will of the people even if the voters are generally unaware of it.<sup>82</sup> As with the use of voting cues, this phenomenon does exist and it may help the electorate exercise some control over policy discretion without engaging in vigilant oversight of public officials, but reliance upon the "potential anticipated response of voters" will not hold politicians accountable for most of their specific policy decisions and may raise other serious problems as well.

The bottom line, once again, is that it is completely unrealistic to believe that a politician's need to predict how her constituents would respond to a particular decision if it were brought to their attention makes elected officials politically accountable for the bulk of their policy choices.<sup>83</sup> Although it ap-

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79. See ZALLER, *supra* note 57, at 244–45 (discussing the importance of name recognition in House elections); Schacter, *supra* note 4, at 65 (explaining that the performance of the economy is a "venerable cue" in presidential elections even though experts have concluded that the President has an exceedingly modest ability to control short-term economic performance).

80. See Schacter, *supra* note 4, at 50 (describing the possibility of "accountability through prediction").

81. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 3–16, 82–87 (1990); MORRIS P. FIORINA, *REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES* 43–63 (1974); V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 496–99 (1961); JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 67–68 (3d ed. 1989); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 36–37 (1975) ("The ultimate concern . . . is not how probable it is that legislatures will lose their seats but whether there is a connection between what they do in office and their need to be reelected.").

82. See Schacter, *supra* note 4, at 50 ("On this view, politicians' steady contemplation of potential voter preferences might support a version of accountability, even if voters themselves never assert or even perceive those preferences.").

83. See *id.* at 54–63 (rejecting the possibility of achieving accountability through prediction based on the problems associated with implementing the theory and its propensities to accept existing inequalities and encourage manipulative behavior by elected officials and other elites).



pears at first glance that this phenomenon could at least provide political accountability for momentous decisions that are likely to reach the public agenda, this conclusion is called into question by the poor quality of political debate and the ability of politicians and interest groups to manufacture public opinion that corresponds with their own preferences.<sup>84</sup> For example, the pro-life lobby and right wing of the Republican Party have apparently succeeded in generating substantial public opposition to “partial-birth abortion.”<sup>85</sup> It is far less clear, however, that a majority of voters favors a prohibition on this procedure in the absence of an exception for the preservation of the health of the mother.<sup>86</sup> Yet, a member of Congress who only favored a ban on the knowing performance of the intact dilation and evacuation procedure for terminating a pregnancy with the aforementioned exception (consistent with the apparent preferences of a majority of voters) may have been forced into voting in favor of the Partial Birth Abortion Act of 2003 based on a legitimate fear that a contrary vote could be used against her at the next election. Similarly, the mounting public support for legislative action to counteract global warming that is being generated by environmental activists and the left wing of the Democratic Party could lead members of Congress to support severely flawed legislative proposals to avoid potential electoral retribution. Not only are political calculations of this nature therefore uncertain to result in action that truly comports with majoritarian preferences, but a realistic fear that voters will subsequently be misled about an incumbent’s voting record could even push decisions about important details of major policy issues away from the preferences that would be held by a more fully informed electorate. The ultimate irony, then, is that far from promoting political accountability, the electorate’s reliance on information shortcuts and an incumbent’s need to consider how voters might respond to her decisions could actually combine to *undermine* majoritarian preferences in certain situations.

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84. See *id.* at 59–63; *supra* notes 56–59 and accompanying text.

85. See MORRIS P. FIORINA, *CULTURE WAR?* 55–56 & n.5 (2005) (reporting that “large majorities of Americans have consistently registered opposition to this particular procedure,” and suggesting that a focus on this procedure by pro-life groups may have been responsible for moving overall public opinion on abortion “a bit in a conservative direction in the late 1990s”).

86. See *id.* at 54–56 (reporting that “huge majorities” of Americans consistently support legal access to abortions when “the woman’s health is seriously endangered”).

For similar reasons, the increased use of direct democracy to make discretionary policy choices would neither obviate the need for democratic accountability nor necessarily enhance the political accountability that exists in our democracy. Despite widespread rhetoric that direct democracy constitutes lawmaking by “the people,” initiative proponents are the dominant force in successful ballot campaigns.<sup>87</sup> Moreover, several features of the ballot initiative process increase the risk that successful ballot measures will have collateral consequences that were not anticipated or approved by the voters.<sup>88</sup> Although some political scientists have been optimistic about the benefits of information shortcuts in the ballot initiative context,<sup>89</sup> most voters can only use the available cues, at best, to cast a rational ballot on the broad objective of a proposal. This literature therefore does not support the conclusion that voters have sufficient information to accurately express their preferences on the *specific legal consequences* of successful ballot measures. As is true in the context of candidate elections, the information shortcuts that are available in the ballot initiative context are simply too general to attribute many of the particular consequences of this lawmaking process to the will of the people. At the same time, the initiative proponents who are in a position to understand and control these particular matters are not politically accountable to anyone for their decisions.

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87. See Staszewski, *supra* note 38, at 420–35 (describing the dominant role and substantial influence of initiative proponents); see also DAVID S. BRODER, *DEMOCRACY DERAILED* 91–161 (2000) (describing the “initiative war in close-up”); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 519 (“Direct democracy consists of two separate processes: proposal by well-organized interests and ratification by the electorate.”); Schacter, *supra* note 39, at 111 (“[T]he direct lawmaking process gives powerful leverage to initiative drafters, who are situated to construct a phantom popular intent through strategic drafting.”).

88. See Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 32–39 (describing this problem).

89. See Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 467–70 (2004) (reporting that recent studies have questioned the notion that the absence of detailed knowledge about the substance of ballot measures prevents the electorate from voting consistent with its preferences); see also SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES* 21–42 (1998); LUPA & MCCUBBINS, *supra* note 51; Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 72 (1994) (“[T]he availability of certain types of information cues allows voters to use their limited resources efficiently while influencing electoral outcomes in ways that they would have if they had taken the time and effort necessary to acquire encyclopedic information.”).

### III. THE DELIBERATIVE ACCOUNTABILITY PARADIGM

The realization that elected officials are not really politically accountable for their specific policy choices has far-reaching implications. For those who hinge democratic legitimacy on majoritarian support for policy decisions, it calls the entire validity of the modern regulatory state into question. Only somewhat less dramatically, it highlights a potentially fatal flaw in modern public law theories, which accord heightened legitimacy to decisions by “politically accountable” institutions, regardless of the process by which they were enacted or their substantive merits. In short, the preceding Part demonstrates that the dominant paradigm in modern public law is implausible because public officials are not held politically accountable for their specific policy decisions pursuant to periodic elections.

Because our instinctive desire for democratic accountability is based on more fundamental commitments to ensuring the legitimacy of governmental authority and avoiding arbitrary decisions, we should consider the possibility of another paradigm of democratic accountability that is based on different features of republican government. This Part draws upon deliberative democratic theory to develop this alternative paradigm by claiming that public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions. First, reason-giving promotes accountability by limiting the scope of available discretion and ensuring that public officials provide public-regarding justifications for their decisions. Second, reason-giving facilitates transparency, which, in turn, enables citizens and other public officials to evaluate, discuss, and criticize governmental action, as well as potentially to seek legal or political reform. Most fundamentally, reason-giving fosters democratic legitimacy because it both embodies, and provides the preconditions for, a deliberative democracy that seeks to achieve consensus on ways of promoting the public good that take the views of political minorities into account. In the course of setting forth an alternative paradigm, this Part compares some of the central features of deliberative and political accountability and responds to potential objections.

## A. THE VALUE OF REASON-GIVING

The word “accountable” means that one is “required or expected to justify actions or decisions.”<sup>90</sup> Although dictionary definitions, standing alone, should certainly not always be dispositive,<sup>91</sup> my contention is that public officials in a democracy can be held *deliberatively accountable* by a requirement or expectation that they give reasoned explanations for their decisions. First, reason-giving promotes accountability by limiting the scope of available discretion. Because collective policy choices in a democracy cannot be justified solely on the basis of self-interest, public officials are expected to give public-regarding justifications for their decisions.<sup>92</sup> Although the need

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90. WORDPERFECT 10 WORDPROCESSOR DICTIONARY. Although the source of this quotation shows that it was incredibly easy to find a definition of accountability that comports with my view, more sophisticated examples are certainly available. See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509–12 (2002) (explaining that psychological studies of “accountability” use the term to refer “to the implicit or explicit expectation that one may be called on to justify one’s beliefs, feelings, and actions to others,” and noting that although the term “also usually implies that people who do not provide a satisfactory justification for their actions will suffer negative consequences,” those consequences need not be material and may include contemptuous glances or even feelings of disappointment in one’s own performance) (quoting Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999)).

91. Cf. Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) (providing a theoretical defense of the canon of statutory interpretation that authorizes the judiciary to deviate from the “plain meaning” of statutory language to avoid “absurd results”).

92. See Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998) (“Because there are powerful norms against naked appeals to interest or prejudice, speakers have to justify their proposals by the public interest.”). For influential ideals of this requirement, see GUTMANN & THOMPSON, *supra* note 7, at 52–94 (describing a principle of “reciprocity,” which requires citizens and officials to “appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated” when they “make moral claims in a deliberative democracy”); Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY, *supra*, at 185, 193–98 (describing a deliberative process in which participants regard one another as free, equal, and reasonable “in that they aim to defend and criticize institutions and programs in terms of considerations that others, as free and equal, have reason to accept, given the fact of reasonable pluralism and on the assumption that those others are themselves concerned to provide suitable justifications” (emphasis omitted)); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 773 (1997) (“A citizen engages in public reason . . . when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.”).

to explain why a particular policy choice would promote the public good may not pose a substantial constraint in many cases, a reasoned decision-making requirement helps to eliminate official self-dealing and “naked preferences” for one individual or group over another.<sup>93</sup> Perhaps more important, an expectation that public officials will provide public-regarding justifications for their decisions changes the nature of legitimate deliberation in the policy-making process.<sup>94</sup> It is not enough for a decision maker to follow her own or her constituents’ pre-political preferences, but she must instead be capable of explaining why a particular course of action is best for the community as a whole.<sup>95</sup> Because public officials must provide public-regarding justifications for their decisions, other participants in the process have incentives to articulate their claims in public-regarding terms as well. As a result, relatively selfish policy options may be discarded in favor of more public-spirited alternatives at the outset of the policy-making process,<sup>96</sup> and subsequent deliberations conducted pursuant to this principle can expose additional common ground.<sup>97</sup>

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93. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (“If naked preferences are forbidden . . . and the government is forced to invoke some public value to justify its conduct, government behavior becomes constrained.”).

94. See Elster, *supra* note 92, at 100 (“The mere fact that an assembly of individuals defines its task as that of deliberation rather than mere force-based bargaining exercises a powerful influence on the proposals and arguments that can be made.”).

95. This is an essential component of civic republican theory. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1531–32 (1992); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–51 (1988) [hereinafter Sunstein, *Republican Revival*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–32 (1985) [hereinafter Sunstein, *Interest Groups*].

96. See Elster, *supra* note 92, at 104 (claiming that the obligation to provide a public-regarding justification creates an incentive for speakers to modify their positions in a less selfish direction because “a perfect coincidence between private interest or prejudice and impartial argument is suspicious”).

97. See GUTMANN & THOMPSON, *supra* note 7, at 43 (“Through the give and take of argument, citizens and their accountable representatives can learn from one another, come to recognize their individual and collective mistakes, and develop new views and policies that are more widely justifiable.”); James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY, *supra* note 92, at 44, 52 (“[O]ne reason a group might want to discuss something rather than simply voting on it is to lessen the effects of bounded rationality, and discussion may serve this purpose, even when there are known conflicting interests in the group.”); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 350 (Elly Stein & Jane Mansbridge trans., 1987) (“[D]uring political deliberation, individuals acquire new perspectives not only

The practice of reason-giving further limits the scope of available discretion over time by encouraging public officials to treat similarly situated persons alike and to treat differently situated persons differently. Frederick Schauer has pointed out that when individuals give reasoned explanations for their decisions, they routinely invoke relatively general principles to justify their chosen courses of action.<sup>98</sup> By making a public commitment to respect those general principles, public officials can be expected to follow them to their logical conclusion whenever they are shown to be applicable.<sup>99</sup> If public officials subsequently deviate from the apparent import of their previously articulated principles, they can be expected to provide a reasoned explanation for why the situation at hand is distinguishable. Reason-giving therefore has the capacity to promote the equal treatment of regulated parties, and to achieve greater overall coherence in the law. Thus, reason-giving allows for the establishment and operation of a system of common-law-style precedent that public officials can be expected to follow or refine when subsequent controversies arise.

Second, reason-giving promotes accountability by facilitating transparency in government. If citizens are unaware that a particular governmental official has made a specific policy decision, they cannot possibly hold that official accountable in any meaningful way for this action. A requirement or expectation that the public official will provide a reasoned explanation for the decision enables interested citizens and other public officials to evaluate, discuss, and criticize the action, as well as potentially to seek political or legal reform. For this process to work, the reasons that governmental officials provide for their decisions must ordinarily be publicly available.<sup>100</sup> Moreover,

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with respect to possible solutions, but also with respect to their own preferences"); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1635–37 (1985) (explaining that "[d]uring the course of deliberation, people may discover both new information and new perspectives about what is at stake in the decision before them," which may lead them both "to modify their choice of means for achieving their ends" and "perhaps to reconsider those ends").

98. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995).

99. See *id.* at 649 ("[G]iving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accordance with that reason.").

100. For an extensive discussion of "the value of publicity" in deliberative democracy, as well as some potentially legitimate exceptions to this general principle, see GUTMANN & THOMPSON, *supra* note 7, at 95–127. For a recent

when an official's explanation for her decision is based on empirical claims, they should be based upon reliable methods of inquiry and consistent with available information.<sup>101</sup> Although a patently false explanation could eventually be disproved, the whole point of a reasoned explanation is to justify a decision on the merits to someone who may not share the official's overarching point of view.<sup>102</sup> It would therefore be illegitimate to trick other public officials or citizens into accepting a policy decision based upon false information. At the same time, a requirement or expectation that policy choices will be publicly justified in a manner that is consistent with reliable methods of inquiry and available empirical information encourages the use of technical expertise in the modern regulatory state.

In addition to providing instrumental benefits by constraining official discretion and promoting transparency in government, an obligation to provide reasons for policy decisions that could reasonably be accepted by free and equal citizens with competing perspectives performs the more fundamental function of promoting the legitimacy of government authority in a democracy.<sup>103</sup> Consent-based theories of legitimacy are notoriously problematic in the absence of unanimity, apart from the difficulties associated with implementing the will of the people that were explored above.<sup>104</sup> Moreover, contrary to the usual assumption, people do not typically enter into the political process with fully formed preferences on specific policy issues. Rather, they routinely have a host of beliefs, values, and interests that are not fully consistent with one another. Deliberative democratic theorists have therefore emphasized that reasoned deliberation helps decision-makers to ascertain *their own* policy preferences by providing them with useful information and competing perspectives about the ideal resolution of a problem.<sup>105</sup> Because this discussion can simultaneously build a broad consensus around a particular solution, the process of

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discussion of the potential drawbacks of public deliberation, see ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 195 (2007).

101. See GUTTMAN & THOMPSON, *supra* note 7, at 15, 56.

102. See *supra* notes 92–95 and accompanying text.

103. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY*, 17, 21 (Alan Hamlin & Philip Pettit eds., 1989); Manin, *supra* note 97, at 340, 388; see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17 (1993) (“In American constitutional law, government must always have a reason for what it does.”).

104. See Manin, *supra* note 97, at 341–44.

105. See *id.* at 349–50.

reasoned deliberation helps to legitimize specific policy choices from the standpoint of the prevailing majority. From this perspective, it is doubtful that public officials could make legitimate policy choices without developing good reasons for taking particular courses of action over the available alternatives.

Deliberative democratic decisions are also legitimate from the standpoint of the minority. Although everyone might theoretically consent to a majority voting procedure because it treats everyone equally and offers opportunities for various groups to prevail on different issues, the validity of this consent would be significantly enhanced if the interests and perspectives of the minority were taken into account in reaching a decision.<sup>106</sup> Indeed, deliberative democratic theorists have gone one step further and claimed that public policies adopted by a majority can only be legitimate if the minority's interests and perspectives were adequately considered during the decision-making process and the prevailing outcome is one that "could be the object of a free and reasoned agreement among equals."<sup>107</sup>

Reason-giving can therefore be understood as the enforcement mechanism that holds public officials accountable for making legitimate policy choices in a deliberative democracy. A requirement or expectation that public officials will give reasoned explanations for their policy decisions that could reasonably be accepted by free and equal citizens with competing perspectives helps to ensure that the government makes valid choices based on the best available information and that the interests and perspectives of minorities are adequately considered. Some prominent legal scholars have, in fact, recently argued from this basic perspective that reason-giving is fundamental to the political and moral legitimacy of a democracy and that elected representatives have a constitutionally mandated obligation to provide reasons for their policy decisions.<sup>108</sup> Regardless of whether it is constitutionally required,

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106. See generally Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23 (2006).

107. Cohen, *supra* note 103, at 22; see also Manin, *supra* note 97, at 359–60 (explaining that the principle of majority rule is only justified if "[t]he decision results from a [deliberative] process in which the minority point of view was also taken into consideration").

108. For these respective arguments, see Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 116 (2007); Brown, *supra* note 106, at 41.



reason-giving can certainly be understood as a viable alternative to elections for purposes of holding public officials democratically accountable for their specific policy choices.<sup>109</sup>

## B. DISTINGUISHING DELIBERATIVE AND POLITICAL ACCOUNTABILITY

The deliberative accountability that is fostered by reason-giving differs in some fundamental ways from the political accountability that is currently envisioned by modern public law theory. First, rather than limiting the time frame during which public officials can be called to account to the holding of periodic elections, deliberative accountability is a far more dynamic phenomenon that frequently begins when a policy question is first being considered, it reaches a crescendo when responsible public officials make a significant decision, and it potentially continues indefinitely while the opponents of the existing status quo press for legal or political change in a variety of institutional settings.<sup>110</sup> The American public law system allows elected officials to enact statutes, which are typically implemented by administrative agencies, reviewed by courts, and potentially modified by subsequent legislative action.<sup>111</sup> Because policy making in this system is fluid, provisional, and dialogic, we need a theory of accountability that can potentially keep pace with the realities of the process. Unlike political accountability, deliberative accountability can meet this challenge because it recognizes that public officials (and others) should give reasoned explanations for their decisions at *each stage* of the policy-making process.<sup>112</sup>

Second, rather than focusing almost exclusively on the agency relationship between elected officials and their voting

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109. Cf. Mashaw, *supra* note 108, at 124 (recognizing that “[t]he alternative to will-based democratic theories are theories based on some vision of public reason,” and claiming that “administration without reason cannot meet the challenge of defending its democratic legitimacy”).

110. Cf. GUTMANN & THOMPSON, *supra* note 7, at 142–43 (describing “the reiteration of deliberation” and explaining that “[i]nstead of the arbitrary moments of accountability that elections offer, deliberative democracy provides an ongoing process” that “continues through stages, as officials present their proposals, citizens respond, officials revise, citizens react, and the stages recur”).

111. See *infra* notes 185–88 and accompanying text (describing the American public law system).

112. See *infra* notes 183–89 and accompanying text (endorsing a framework of separated powers that envisions “a checking and balancing circle of deliberative circles”).

constituents, deliberative accountability provides a more comprehensive way of accommodating the full array of relations that are implicated by policy-making decisions. For starters, an authoritative decision maker has a responsibility *to herself* to reach a decision that she finds acceptable in light of her knowledge of the relevant facts and circumstances.<sup>113</sup> Social scientists and philosophers have recognized that reason-giving is an innate characteristic of human beings that is associated with our ability to rationally evaluate and justify our actions.<sup>114</sup> From this perspective, we do not necessarily need to give reasons *to anyone* for reason-giving to carry intrinsic meaning. On the other hand, elected officials in a democracy do have special obligations to their constituents and other public officials to consider their interests and perspectives and to provide reasoned explanations for policy choices that take these considerations into account.<sup>115</sup> At the same time, deliberative accountability is not limited to an obligation by elected officials to consider (much less mechanically follow) the preferences of their voting constituents on each particular issue.<sup>116</sup> Rather, public officials in a deliberative democracy also have an obligation to consider the interests and perspectives of everyone who will be bound by a decision,<sup>117</sup> as well as other persons who could subsequently be affected, including noncitizens and people who have yet to be born.<sup>118</sup> Deliberative accountability is therefore capable of transcending electoral boundaries and encouraging public officials to reach the best possible decisions on

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113. See John Gardner, *The Mark of Responsibility (with a Postscript on Accountability)*, in PUBLIC ACCOUNTABILITY, *supra* note 11, at 220, 220–43.

114. See CHARLES TILLY, *WHY?* 8 (2006) (“While, by some definitions, other primates employ language, tools, and even culture, only humans start offering and demanding reasons while young, then continue through life looking for reasons why.”); Gardner, *supra* note 113, at 221 (“As rational beings we cannot but aim at excellence in rationality.”).

115. See GUTMANN & THOMPSON, *supra* note 7, at 128–29 (“Representatives are first of all accountable to voters, and to others with whom they have some special relationship (such as supporters of their party).”).

116. Cf. Sunstein, *Interest Groups*, *supra* note 95, at 41–43 (describing Madison’s vision of representation).

117. See *supra* notes 106–07 and accompanying text.

118. See GUTMANN & THOMPSON, *supra* note 7, at 144–64 (discussing “the problem of constituency” in a deliberative democracy and claiming that the principle of accountability requires that “representatives justify their actions from a moral point of view, which implies that they owe an account not only to their electoral constituents but also to what we may call their *moral* constituents—citizens in other states and other nations, groups of disadvantaged citizens, and citizens yet to be born”).

the merits in light of the entire range of competing perspectives and affected interests.

Third, while political accountability rests upon the power of segments of the electorate to sanction deviant public officials, deliberative accountability is premised on the need for public officials and citizens to persuade one another of the merits of their positions. Instead of privileging political power, deliberative accountability emphasizes the obligation of public officials and citizens to engage with one another on the substance of policy issues with an attitude of mutual respect.<sup>119</sup> Reason-giving initially fosters self-respect by allowing public officials to do what they believe is appropriate under the circumstances based upon the best available information. Because participants in the policy-making process can be expected to give reasons for their positions that could be accepted by free and equal persons with fundamentally competing perspectives, however, deliberative accountability simultaneously encourages public officials (and others) to respect alternative views and interests and be open to revising their initial preferences based on additional information.<sup>120</sup> Thus, a requirement or expectation that public officials will provide a reasoned explanation for their decisions should be understood as a defining feature of republican democracy,<sup>121</sup> at least as important as periodic elections, because it forces public officials to treat citizens who are bound by their decisions with the proper degree of respect. While it may be appropriate for a parent to respond to a child's request for an explanation with the witty repartee, "because I said so," or, more authoritatively, "because I'm your [parent] and I said so," this merely demonstrates that families are not necessarily democracies. In a true democracy, citizens are ordinarily entitled to a more meaningful explanation for the official exercise of coercive authority.

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119. See Sunstein, *Republican Revival*, *supra* note 95, at 1549–50 ("The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups."). On the respect that is fostered by reasoned deliberation, see GUTMANN & THOMPSON, *supra* note 7, at 18 ("When citizens deliberate in democratic politics, they express and respect their status as political equals even as they continue to disagree about important matters of public policy."); Cohen, *supra* note 92, at 186 (explaining that in the deliberative conception of democracy, "citizens treat one another as equals . . . by offering them justifications for the exercise of collective power framed in terms of considerations that can, roughly speaking, be acknowledged by all as reasons").

120. See, e.g., Manin, *supra* note 97, at 349–64 (explaining how deliberation can shape individual preferences and achieve collective legitimacy).

121. See *supra* notes 108–09 and accompanying text.

Finally, rather than viewing any policy outcome that is presumptively supported by a majority of voters as legitimate, deliberative accountability maintains that the legitimacy of a policy decision is a function of both its procedural and substantive validity.<sup>122</sup> Thus, as explained above, public officials should ordinarily be expected to give reasoned explanations for their decisions that are publicly available. Moreover, the reasons provided should be public-regarding and potentially acceptable to free and equal persons with fundamentally competing perspectives, as well as consistent with the best available empirical evidence. Public officials and other citizens should therefore be willing, and even expected, to consider changing their positions in light of new information or arguments. At the same time, policy makers should follow their previously articulated principles on an even-handed and consistent basis and be capable of providing reasoned explanations for alleged deviations from prior courses of action.

### C. POTENTIAL OBJECTIONS

Critics of deliberative democracy who have absorbed the lessons of legal realism and been conditioned to understand law and politics in a pluralistic fashion routinely dismiss the quest for deliberative consensus or agreement on the grounds that an objective public interest does not exist. This criticism, which is most likely a holdover from the elitist political thinking of Edmund Burke,<sup>123</sup> reflects a fundamental misunderstanding of contemporary theories of deliberative democracy that seek to facilitate deliberative consensus or agreement *in the face of* intractable moral disagreement.<sup>124</sup> The idea is not that reasoned

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122. See, e.g., GUTMANN & THOMPSON, *supra* note 7, at 27; Cohen, *supra* note 92, at 187.

123. See Roberto Gargarella, *Full Representation, Deliberation, and Impartiality*, in DELIBERATIVE DEMOCRACY, *supra* note 92, at 260, 263–64 (describing “Burke’s model” of deliberative democracy and explaining that there is “plain textual evidence . . . of the confidence he had in deliberation as a means for achieving ‘correct’ political decisions”).

124. See GUTMANN & THOMPSON, *supra* note 7, at 1 (explaining that the core idea of deliberative democracy is that “when citizens and their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions”); Cohen, *supra* note 92, at 187–93 (describing his assumption of “the fact of reasonable pluralism: the fact that there are distinct, incompatible philosophies of life to which reasonable people are drawn under favorable conditions for the exercise of practical reason”); Rawls, *supra* note 92, at 765–66 (“[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive

deliberation will eliminate fundamental moral disagreement or lead to the discovery of uniquely correct answers to controversial policy questions, but rather that it will compel participants in the policy-making process to respect fundamentally divergent perspectives, while simultaneously improving the quality of the particular policy decisions that are rendered through the pooling of both information and ideas, and the utilization of substantive expertise.<sup>125</sup> Although a substantial degree of reasonable disagreement will undoubtedly remain, the process of reasoned deliberation should facilitate tentative resolutions to specific policy questions that are more widely acceptable to a broader range of interests, partly as a function of eliminating certain objectionable types of reasons for action from consideration in the public arena.<sup>126</sup> In short, the underlying hope is that if we take unduly partial reasons for acting off the table, provide decision-makers with the best available empirical information, and encourage them to resolve the problem through deliberations that are conducted in a spirit of mutual respect and cooperation, the final policy decision is likely to be the most legitimate and meritorious option under the circumstances.

One could, of course, still raise several potential objections to the claim that public officials in a democracy can be held accountable by a requirement that they give reasoned explanations for their decisions. First, it is possible that public officials and other citizens will provide insincere reasons for their policy decisions.<sup>127</sup> While motivated primarily by their own selfish interests or those of powerful constituents, participants in the policy-making process could still satisfy the demands of deliberative accountability by providing certain public-regarding justifications for their positions. The concern is not only that rent-seeking policy choices would thereby be accorded false legitimacy, but that a requirement or expectation that public officials provide reasoned explanations for their decisions creates an affirmative incentive for such duplicity. From this perspec-

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doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions.”).

125. See Fearon, *supra* note 97, at 44–68 (cataloguing potential benefits of reasoned deliberation); *supra* notes 119–22 and accompanying text.

126. See *supra* notes 92–97 and accompanying text.

127. See, e.g., Fearon, *supra* note 97, at 47 (“The principal dilemma for discussion as a means of revealing private information relevant to a political choice is that people can have strategic incentives to misrepresent their preferences or special knowledge.”).

tive, voters should be encouraged to judge public officials not by what they say, but rather by what they do.

While there is little doubt that public officials and other citizens sometimes give insincere reasons for their policy decisions, this situation does not severely undermine the significance of deliberative accountability.<sup>128</sup> First, the prospect of judging public officials solely by what they do falsely assumes that the prevailing paradigm of political accountability is actually effective.<sup>129</sup> Second, the fact that a public official provided a reasoned explanation for a decision hardly forecloses one's ability to remain unpersuaded or to challenge any accompanying legal or political action. Rather, the existence of deliberative accountability enables citizens to contest both what public officials have said *and* what they have done. Although the provision of a reasoned explanation bolsters the legitimacy of governmental action, it need not necessarily increase its popularity or the extent to which there is societal agreement on the matter.<sup>130</sup> In addition to the benefits described above, deliberative accountability is premised on a conviction that it is more productive to debate the merits of particular policy choices, rather than trying to ascertain or impugn the motives of those who have taken a position.<sup>131</sup> It would admittedly be preferable if public officials and citizens regularly provided genuine reasons for their positions, but insincerity does not eliminate our ability to evaluate the merits of their choices or the explanations that they have provided to justify them. On the contrary, insincere explanations are more likely to be vulnerable to criticism.<sup>132</sup>

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128. The notion of deliberative accountability that is set forth here differs in this respect from some prominent theories of deliberative democracy. See John M. Kang, *The Irrelevance of Sincerity: Deliberative Democracy in the Supreme Court*, 48 ST. LOUIS U. L.J. 305, 306 (2004) (identifying several prominent theorists of deliberative democracy who have advocated sincerity in public discourse). For a similar perspective to my own, see Elster, *supra* note 92, at 100–05 (“[A] deliberative setting can shape outcomes independently of the motives of the participants.” (emphasis omitted)).

129. See *supra* Part II (describing the weaknesses of political accountability).

130. See GUTMANN & THOMPSON, *supra* note 7, at 73–91 (discussing legitimate ways of dealing with “deliberative disagreement”).

131. See *id.* at 171 (“Utilitarians rightly remind us that attacks on motive and character distract citizens from the substance of issues.”).

132. The use of “strict scrutiny” in constitutional law has been justified partly on the same underlying basis. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802 (2006).

A second potential objection to reason-giving as a form of accountability stems from the possibility that the implementation of deliberative democracy could reinforce existing societal inequalities based on its relatively exclusive nature.<sup>133</sup> Because only a small percentage of public officials and engaged citizens or interest groups will personally deliberate about politics or even become aware of the reasoning that is provided by authoritative decision-makers or other activists, the interests and perspectives of the inattentive public could potentially be systematically ignored. This concern is heightened by the fact that actual political knowledge and participation is distributed unequally in our society, and media coverage and other sources of political information are similarly skewed in favor of the well-organized and socially advantaged.<sup>134</sup> In other words, the concern is that deliberative accountability is inherently elitist in nature and that excessive reliance upon it could therefore either be detrimental to socially marginalized individuals and groups or unsympathetic to the majority's preferences.

Although simultaneously avoiding both majority and minority faction is undoubtedly tricky, reliance upon reasoned deliberation is apt to fare better than political accountability in this regard. The prevailing paradigm of political accountability is premised upon a pluralist understanding of politics in which the role of public officials is merely to aggregate and implement the preferences of their constituents. If this system worked *properly*, the interests of discrete and insular minorities would systematically be ignored, at least in the absence of some counter-majoritarian corrective.<sup>135</sup> To the extent that the members of such groups lack political knowledge and fail to participate in the process, this problem is severely exacerbated. It is therefore fairly obvious to see how unmediated popular decision making could lead to the tyranny of the majority. Conversely, if a ma-

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133. See, e.g., Gargarella, *supra* note 123, at 269–74 (identifying the difficulties associated with achieving “full representation” in contemporary societies, and concluding that proposals for improving “the impartiality of the decision-making process just by improving its deliberative character” are implausible “if most people are kept at the margins of political deliberation”).

134. See Eule, *supra* note 41, at 1514–15 (“Citizens of higher social and economic status are far more heavily represented among [American] voters than among those who abstain, a class skew virtually unparalleled in any other political system conducting free elections.”); Somin, *supra* note 4, at 1354–64 (describing “large intergroup differences in political knowledge . . . in the United States today”).

135. For a classic defense of judicial review that is based on the need to reinforce the representation of these interests, see ELY, *supra* note 22.

jority of citizens lack political knowledge and fail to participate effectively, the pluralist political process could be captured by narrow special interests with disproportionate influence over public officials.<sup>136</sup> Because political participation and knowledge is distributed unequally in our society, an unregulated pluralist political process is, in fact, likely to lead to majoritarian tyranny on some issues and special interest domination of others—the worst of both worlds from an institutional design perspective.

Discrete and insular minorities and unorganized general interests are both better situated to prevail in a system that values reason-giving because deliberative accountability privileges persuasive ideas over political power.<sup>137</sup> A political system of this nature treats each distinct interest and perspective with equal respect by taking them fully into account in formulating a decision. Because the prevailing policy choices should be based on the best available options under the circumstances, the specific sources of competing proposals and their respective popularity should not ordinarily be determinative. This does not mean, however, that such considerations are completely irrelevant. For example, public officials should give due regard to the input of anyone with relevant expertise.<sup>138</sup> Moreover, it may be appropriate for public officials to consider the intensity of preferences and provide extra weight to the interests of those who will be most greatly affected by a particular decision.<sup>139</sup>

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136. This is one of the central lessons of public choice theory. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

137. See, e.g., GUTMANN & THOMPSON, *supra* note 7, at 132–34 (“To the extent that the political struggle takes place on the basis of deliberation rather than of power, it is more evenly matched.”); see also Cohen, *supra* note 103, at 21–22 (claiming that political power can be justified “if and only if [a decision] could be the object of a free and reasoned agreement among equals”); Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics into Law*, 65 LAW & CONTEMP. PROBS. 95, 100–01 (2002) (explaining that under deliberative democratic theory, “[u]ses of political power should be choice-sensitive and status insensitive”).

138. See Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 35–39 (2006) (advocating “expertise systems” as “an effective way to improve social welfare” and claiming that even though such systems “are not consistent with many views of deliberation, where equality among participants is a key feature . . . many scholars who advocate deliberation actually recommend some form of an expertise system”).

139. See Fearon, *supra* note 97, at 45–46 (explaining that discussion “allows people to express diverse *intensities* of preferences” and that the “relatively nuanced revelation of private information” that is facilitated by deliberation may influence voting decisions).



The apparent preferences of a majority might otherwise play a tie-breaking function in the absence of any need for structural safeguards to protect minority interests.<sup>140</sup> The crux of the matter is that unlike in a pluralist system, the inattentive public does not need to be equally represented in either numbers or power in order to protect their interests in a deliberative democracy, as long as their voices can be heard and they have something significant to say.

This does not mean that existing inequalities in political knowledge and participation are entirely unproblematic. On the contrary, the inability or failure of some individuals or groups to acquire available information and participate in the political process makes it more difficult for them to ensure that their interests and perspectives will be addressed. Moreover, the relative silence of some constituents may lead public officials to ignore their most pressing concerns or underestimate the intensity of their preferences or the degree of various sentiments on issues that do make the political agenda. Finally, the exclusion of the vast majority of the general public from the political dialogue is bound to hamper the quality of public deliberations by limiting the number of resources that are devoted to our collective problems, even if each major perspective or interest is represented. Accordingly, it would clearly be beneficial if existing disparities in political knowledge and participation were eliminated, as well as if the depth and quality of the information about public affairs that is provided by educational institutions and the media were substantially improved. Nonetheless, the goal of ensuring that *public officials* are deliberatively accountable for their actions can be achieved if *they* provide reasoned explanations for their policy decisions and a sufficiently diverse range of perspectives is adequately engaged to inform, evaluate, and potentially contest them. This particular standard could be met even if the vast majority of the electorate remained uninformed about politics or otherwise behaved in a less than virtuous fashion.<sup>141</sup>

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140. See GUTMANN & THOMPSON, *supra* note 7, at 141–42 (describing the circumstances in which “the deliberative principle of accountability justifies or allows deference to popular opinion”); Cohen, *supra* note 92, at 197 (“[W]hen people do appeal to considerations that are quite generally recognized as having considerable weight, then the fact that a proposal has majority support will itself commonly count as a reason for endorsing it.”).

141. See GUTMANN & THOMPSON, *supra* note 7, at 132–33 (“Disadvantaged groups have usually found representatives from within their own ranks who could speak for them, and who could articulate their interests and ideals, at

A third potential objection to deliberative accountability stems from its relative indifference to the electorate's potential capacity to sanction public officials who make inappropriate decisions.<sup>142</sup> As previously explained, however, electoral sanctions are sometimes unavailable for public officials, like the President, who are routinely considered politically accountable.<sup>143</sup> Moreover, some public officials who should be expected to give reasoned explanations for their decisions are subject to periodic elections. The fact that political accountability is much weaker than conventional theories of public law maintain does not mean that elections are irrelevant or unnecessary in a democracy.<sup>144</sup> In an ideal world, the reasons that public officials provide (or fail to provide) for their decisions would strongly influence voting decisions.<sup>145</sup> A public official's susceptibility to periodic elections should therefore be one relevant factor in defining her institutional responsibilities, even if modern public law theory dramatically overstates its importance.<sup>146</sup>

In any event, removing a public official from office pursuant to an election is not the only available sanction for illegitimate or unpopular decisions. For example, unelected agency heads and federal judges are potentially subject to removal from office or impeachment for some misbehavior.<sup>147</sup> Of greater relevance for deliberative accountability, reason-giving imposes a meaningful form of self-discipline upon the public officials

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least as reasonably and effectively as representatives of established groups.”).

142. See Rubin, *supra* note 1, at 2073 (defining accountability as “the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation”); *supra* notes 64–67 and accompanying text (describing this aspect of the political accountability paradigm).

143. See *supra* note 64 and accompanying text.

144. See *supra* notes 14–15 and accompanying text.

145. Cf. Rawls, *supra* note 92, at 769 (“When firm and widespread, the disposition of citizens to view themselves as ideal legislators, and to repudiate government officials and candidates for public office who violate public reason, is one of the political and social roots of democracy, and is vital to its enduring strength and vigor.”). For a recent reminder that we do not live in this ideal world, see DREW WESTEN, *THE POLITICAL BRAIN* (2007) (describing the dominant role of emotion in processing political information).

146. See *infra* Part IV; see also GUTMANN & THOMPSON, *supra* note 7, at 146 (“To defend deliberative accountability, we do not have to deny that representatives should attend to the claims of those who elect them.”).

147. See U.S. CONST. art. III, § 1 (providing that federal judges “shall hold their Offices during good Behaviour”); *United States v. Perkins*, 116 U.S. 483, 484 (1886) (recognizing the power of removal that is incident to the President’s power of appointment under the Constitution).

who are subject to this particular requirement or expectation.<sup>148</sup> Reason-giving also subjects public officials to more fully informed public oversight and criticism.<sup>149</sup> It may also provide a crucial basis for a legal challenge to the validity of the underlying decision.<sup>150</sup> And regardless of the outcome of judicial review, most of the specific policy decisions by public officials are open to subsequent challenge on the merits in the political process.<sup>151</sup> Although most of the available avenues for responding to the decisions of public officials are pursued by other public officials and elites rather than by ordinary citizens, the critics of earlier policy choices should also be expected to provide reasoned explanations of their own to mount a successful challenge to the prevailing status quo. Accordingly, the sanctions that are available to challenge the merits of governmental action will continue to promote even further deliberative accountability.

#### IV. ENHANCING THE FOCUS ON DELIBERATIVE ACCOUNTABILITY IN MODERN PUBLIC LAW

The foregoing observations do not mean that elections are meaningless or unnecessary in a democracy. Rather, as explained at the outset of this Article, periodic elections do per-

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148. See Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 761–63 (2006) ("Defenders of hard look review, including the courts that employ it, argue that it ensures the supposedly expert agency really has based its decision on a reasoned analysis of relevant information."). As Stephenson explains, critics of hard-look judicial review vigorously dispute its purported benefits and whether they are worth the costs. See *id.* at 763–65. For a discussion of similar issues that are raised about the purported benefits of written judicial opinions, see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283 (2008).

149. See *supra* text accompanying note 100.

150. For example, federal administrative decisions will be invalidated as arbitrary or capricious under the APA if an agency:

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

151. See *infra* note 188 and accompanying text. Because the judiciary has neither the power of the purse nor the sword, political officials can also conceivably refuse to enforce or follow their decisions. See Friedman, *Dialogue*, *supra* note 21, at 643–48 (challenging the assumption that a judicial decision constitutes the last word on an issue).

form some vital functions, including holding public officials politically accountable in a very general way.<sup>152</sup> They do not guarantee, however, that elected officials are politically accountable in a meaningful way for their specific policy decisions. If we really want to promote the legitimacy of government authority and avoid arbitrary decisions, we need to think about democratic accountability in different and more sophisticated ways.

This Part argues that the political accountability paradigm that dominates American public law should be discarded in favor of an enhanced focus on deliberative accountability. It proceeds to explain that this course of action would have significant implications for the proper conception of the structure of American democracy, which would help to resolve some of the most contested issues in the fields of constitutional theory, administrative law, and legislation. Finally, it points out that a paradigm shift of this nature would have tangible implications for certain individual rights, which are illustrated by the controversy over the appropriate legal treatment of same-sex marriage.

#### A. THE NEED FOR A PARADIGM SHIFT IN MODERN PUBLIC LAW

This Article has explained that the prevailing paradigm of democratic accountability is implausible because public officials are not held politically accountable for their specific policy decisions by periodic elections. It has also claimed that public officials can be held deliberatively accountable by a requirement or expectation that they give reasoned explanations for their policy decisions that could reasonably be accepted by free and equal citizens with different interests and perspectives. Because public law theory and doctrine should be consistent with reality or, at a minimum, based on legal fictions that improve the workings of democracy,<sup>153</sup> this section claims that we should discard the political accountability paradigm as a basis for legitimizing specific policy decisions in favor of an enhanced focus on deliberative accountability.

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152. See *supra* notes 14–15 and accompanying text.

153. For a discussion of the use of these techniques in statutory interpretation, see Schacter, *supra* note 30, at 593 (identifying a new conception of democratic legitimacy in statutory interpretation whereby the court assigns meaning to a contested statutory term by using interpretive rules that are designed to produce “democratizing effects” that correspond to a particular image of democracy).

The Article has already established that the political accountability paradigm does not comport with reality. Moreover, it seems unlikely that this will ever be the case without unattainable increases in political knowledge and participation.<sup>154</sup> The only remaining question, then, is whether the fiction of political accountability serves a valuable function in public law theory and doctrine. Although it is worthwhile to remind unelected officials that they should ordinarily defer to the clear policy choices of elected representatives, this particular message can be sent in better ways. The same is true of the idea that public officials should duly respect the ascertainable preferences of the majority. Because “political accountability” is otherwise nothing more than empty rhetoric that can be used by one side or the other at all times and in all cases, the existing paradigm appears on balance to be a liability. This is especially true when arbitrary or otherwise unjustified decisions are privileged solely because they were made pursuant to direct democracy or by elected officials who could theoretically be held accountable by the voters at the next election.

The fundamental problem with the fiction of political accountability is that it does not contain a coherent stopping point—it tells unelected officials that they must *always* defer to the policy choices of elected representatives and the majoritarian preferences they embody. Meanwhile, however, the ideal of political accountability is moderated in our federal system by separated powers and checks and balances that necessarily limit the extent to which governmental policies will reflect the will of the majority.<sup>155</sup> Elected representatives may depart from the wishes of their constituents, and overcoming the hurdles of bicameralism and presentment requires a supermajority.<sup>156</sup> Moreover, the power of judicial review can lead to the invalidation of statutes that have surmounted the hurdles of the legislative process.<sup>157</sup> Because these structural safeguards are designed to protect individuals and political minorities from the

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154. See Somin, *supra* note 4, at 1325 (arguing that there is a small payoff to an individual for acquiring political knowledge, and as a result, political ignorance is unlikely to change in the foreseeable future).

155. See, e.g., Eule, *supra* note 41, at 1522–31 (providing an influential discussion of the republican safeguards against majority faction that are provided by the Constitution); Sunstein, *Interest Groups*, *supra* note 95, at 31–49 (same).

156. See Manning, *supra* note 34, at 74–78.

157. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

tyranny of the majority,<sup>158</sup> they inherently conflict with the political accountability paradigm and present an insoluble counter-majoritarian difficulty.<sup>159</sup> At the end of the day, the political accountability paradigm that currently dominates public law theory and doctrine is both completely unrealistic and incompatible with existing democratic institutions.

Although it is difficult to say how often public officials provide reasoned explanations for their decisions that could reasonably be accepted by free and equal persons with different interests and perspectives, it seems plausible to believe that deliberative accountability is at least as prevalent as political accountability as an empirical matter in the modern regulatory state.<sup>160</sup> Moreover, deliberative accountability is self-consciously aspirational in nature,<sup>161</sup> whereas political accountability is often falsely presumed to exist by modern public law theory. The fact that deliberative accountability and political accountability both fall short of their ideal levels therefore poses far more difficulties for the latter theory.<sup>162</sup> As explained above, political accountability is routinely presumed to be self-enforcing, and correcting its deficiencies would require unattainable increases in existing levels of political knowledge and participation.<sup>163</sup> Conversely, outside enforcement mechanisms and structural safeguards already exist and can be further reinforced to facilitate greater levels of deliberative accountability in the modern regulatory state.<sup>164</sup> Reason-giving therefore offers a far more promising route for ensuring that public officials who exercise discretionary authority can be held accountable for their decisions.

Interestingly, if reason-giving is viewed as the relevant mechanism of democratic accountability, the existing hierarchy of perceived institutional competence in modern public law

158. See *supra* note 155 and accompanying text.

159. See Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1494 (2002) (“[C]laims of liberty are often understood as assertions of ‘trumps’ against majority decisions and thus in tension with democratic rule.”).

160. See *infra* notes 165–170 and accompanying text.

161. See, e.g., GUTMANN & THOMPSON, *supra* note 7, at 357 (acknowledging that deliberative democracy’s “highest ideals make demands that actual politics may never fulfill”).

162. See *id.* (“The gap between the theory and practice of deliberative democracy is narrower than in most other conceptions of democracy.”).

163. See *supra* note 154 and accompanying text; *supra* Part I.

164. See *infra* notes 165–70 and accompanying text; *infra* Part IV.B.

would be completely reversed. The independent judiciary is routinely expected to provide reasoned explanations for its decisions.<sup>165</sup> Moreover, federal administrative agencies are subject to procedural safeguards, including hard-look judicial review, that often compel them to provide reasoned explanations for their decisions as well.<sup>166</sup> The judiciary does not ordinarily impose a meaningful reasoned decision-making requirement upon the legislature,<sup>167</sup> but the successful enactment of a statute pursuant to the constitutional requirements of bicameralism and presentment ordinarily requires lawmakers to engage in reasoned deliberation with their colleagues.<sup>168</sup> There are no comparable structural safeguards that consistently require the President to give reasoned explanations for his decisions,<sup>169</sup> but congressional oversight and modern media coverage may provide some selective opportunities for his policy decisions to be

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165. See, e.g., John Rawls, *The Idea of Public Reason*, in DELIBERATIVE DEMOCRACY 93, 108–14 (James Bohman & William Rehg eds., 1997) (characterizing the Supreme Court as the “exemplar” of the type of “public reason” that should govern the public arena); see also Oldfather, *supra* note 148, at 1285 (recognizing “longstanding conceptions of the judicial role, in which reasoned analysis stands as the core feature of legitimate judging”); Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1574 (1988) (recognizing that appellate judges are usually accountable in the sense that they give reasons or justifications for their decisions).

166. See Staszewski, *supra* note 38, at 443–46 (“The net result of APA procedures and ‘hard-look’ judicial review under *State Farm* is to encourage and enforce republican ideals of deliberation and reasoned decisionmaking in the administrative lawmaking process.”); Sunstein, *Interest Groups*, *supra* note 95, at 56–58 (describing administrative law doctrine as “classically republican” because of its requirements of “deliberation” and “reasoned analysis”).

167. See, e.g., *Harris v. McRae*, 448 U.S. 297, 322 (1980) (recognizing the “presumption of constitutional validity” that is ordinarily attributed to acts of Congress); Phillip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 444 (1998) (“Federal constitutional law conclusively presumes that, when general legislation affects many people, the legislative process” meets the criteria of due process of lawmaking because it “develop[s] the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions” and promotes “participation and dialogue by affected individuals in the decisionmaking process”).

168. See Staszewski, *supra* note 91, at 1018–22 (describing the reasoned deliberation that is facilitated in the legislative process by the constitutional safeguards of representation and bicameralism and presentment).

169. The Constitution, however, requires the President to report periodically on “the state of the union” and to provide the reasons for his objections to a bill that was presented to him by Congress if he returns the proposal to the legislature without his signature. U.S. CONST. art. I, § 7, cl. 2; art. II, § 3.

subject to deliberative accountability.<sup>170</sup> For the most part, however, neither the voters nor the initiative proponents are required or expected to provide reasoned explanations for their particular decisions during the ballot initiative process.<sup>171</sup>

In any event, an enhanced focus on deliberative accountability would avoid the internal contradictions of the existing paradigm because the structural safeguards of the lawmaking process can all be understood to facilitate reasoned deliberation, in addition to protecting individual rights and political minorities.<sup>172</sup> Representation and bicameralism and presentment therefore play a coherent moderating role for the ideal of deliberative accountability. Specifically, their existence provides a legitimate reason for one institution to defer to choices made by other institutions even when officials in the former institution would not otherwise have chosen a specific course of action.<sup>173</sup> This explains why an emphasis on deliberative accountability *does not* mean that courts and agencies should be the primary policy makers in a republican democracy.

As indicated above, courts and agencies may very well do the best job of providing reasoned explanations for their decisions on a regular basis. Nonetheless, when elected representatives of the people successfully enact a law pursuant to the Constitution's single, finely wrought, and exhaustively considered process of lawmaking, the resulting product is entitled to respect based on this pedigree.<sup>174</sup> Elected officials do, moreover,

170. See, e.g., Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 843–45 (1996) (describing the “rhetorical functions” performed by the modern presidency through its “public media role”).

171. See Staszewski, *supra* note 38, at 398 (recognizing that direct democracy allows unelected citizens to make laws without structural safeguards that “are designed to encourage careful deliberation and reasoned decisionmaking in the legislative process”); Staszewski, *supra* note 88, at 32–39 (claiming that the initiative process facilitates deceptive behavior by initiative proponents and increases the risk that successful ballot measures will have collateral consequences not intended by the voters).

172. See *supra* note 168 and accompanying text.

173. See Eule, *supra* note 41, at 1532 (recognizing that a successfully enacted statute necessarily “passed through an extensive filtering system,” characterizing the results of this process as “majoritarianism *plus*,” and claiming that “[i]t is the plus that reflects the Framers’ unique vision of democracy, and it is the plus that warrants judicial caution in substituting its own judgment”); *supra* notes 167–68 and accompanying text.

174. See *supra* note 173; see also *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983) (holding that the legislative veto violates the constitutional require-



have some significant deliberative advantages over courts based on their access to a broader range of information and perspectives and their ability to engage in logrolling and to set their own agendas.<sup>175</sup> Unruly as the legislative process may be, it is typically appropriate for courts to presume that ordinary legislation is constitutionally valid and to follow a version of legislative supremacy in statutory interpretation. The basis for this respect is not, however, that legislation reflects the will of the majority and voters will hold elected representatives accountable if it does not, but rather that a statute has ordinarily emerged from a deliberative process that requires broad agreement on ways of promoting the public good.<sup>176</sup>

The same rationale explains why administrative agencies are obligated to follow legislative intent when Congress has explicitly resolved a particular issue.<sup>177</sup> Moreover, similar considerations explain why courts should often defer to the policy choices of agencies when this is not the case.<sup>178</sup> That said, there is no reason to think that the structural safeguards of lawmaking are infallible. For example, statutes and regulations might infringe the constitutional rights of individuals or minority

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ments of bicameralism and presentment, and explaining that the Framers decided that "the legislative power of the Federal government [could only] be exercised in accord with a single, finely wrought and exhaustively considered, procedure").

175. See, e.g., Eule, *supra* note 41, at 1556 ("Legislative logrolling over a broad agenda brings minorities into the process and allows resulting compromises to accommodate their interests."); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 814 (1999) (explaining that "[b]ecause of its numbers, Congress is capable of mediating a great variety of interests" and "[a]s a result, it is capable of reaching more nuanced compromises on national issues. . . . to reach the public good").

176. See Eule, *supra* note 41, at 1532 (recognizing that "[t]he 'difficulty' with judicial review entails its reconciliation with the constitutional version of democracy, not with some abstract form that exalts unfiltered majoritarianism" and claiming that the countermajoritarian difficulty "would be more accurately conceptualized as a 'counter-representative' or 'counter-republican' difficulty"); see also Sunstein, *Republican Revival*, *supra* note 95, at 1550 ("The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals.").

177. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

178. See Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 677 (1996) ("[T]he deference that courts extend to legislative rules reflects an assumption that, because due opportunities for comment and deliberation have occurred, the product is worthy of judicial respect."); *supra* note 166 and accompanying text.

groups or pose unanticipated problems when they are subsequently applied to unforeseen circumstances. Agencies may simply bow to political pressure rather than engage in reasoned decision making. In light of these dangers, the judiciary is in a good position to oversee the implementation of public law and to serve a legitimate checking function by reviewing the decisions of the political branches. Instead of viewing judicial review as a countermajoritarian force in an otherwise majoritarian system, this conception of the judicial role recognizes that the true reasons for deference to political institutions can run out, thereby reinvigorating the need for meaningful deliberative accountability.<sup>179</sup> From this perspective, the angst that public law scholars have plainly felt about the need to legitimize the role of courts and agencies in our democracy would be better directed toward the shortcomings of deliberative accountability in the political branches of our government. From “earmarks” to omnibus legislation to stonewalling by executive branch officers, we need to find ways to encourage or require elected officials to give transparent, public-regarding reasons for their policy choices on a more regular basis.<sup>180</sup>

In sum, the deliberative accountability paradigm is more realistic and internally coherent than the political accountability paradigm that currently dominates public law theory and doctrine. The deliberative accountability paradigm is also more normatively attractive. Consistent with our constitutional traditions, it recognizes the legitimacy of setting appropriate lim-

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179. See, e.g., Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1411–12 (1978) (recognizing that judicial deference is often justified on the grounds “that the governmental body which has enacted a regulatory measure is best equipped to make judgments of policy and strategy, and further, that the body in question can and will measure its own conduct against constitutional requirements” and claiming that “judicial departures from the tradition of deference are often justified by circumstances which impair or render suspect this process of legislative deliberation”).

180. The articulation and defense of specific reform proposals of this nature are beyond the scope of this Article. Heightened standards of judicial review for “due process of lawmaking” are one potential option, but it would certainly be preferable to find “political solutions” for these accountability deficits if at all possible. Cf. Brown, *supra* note 106, at 37 (recognizing that the “frightening specter” of imposing “substantive obligations [on] legislatures” has never “gained much purchase in American constitutional law” and that this is unlikely to change); Frickey & Smith, *supra* note 50, at 1707–09 (claiming that an accurate understanding of congressional decision-making processes suggests that Congress cannot satisfy a judicially imposed requirement of due deliberation and rational, articulated decision-making).

its on majority rule without ignoring the value of public opinion. At the same time that it holds public officials accountable for their policy decisions, the deliberative accountability paradigm also respects other fundamental democratic values, including liberty, equality, and First Amendment guarantees, regardless of the pre-political preferences of a majority. The fact that protecting these values is often considered *undemocratic* under the existing paradigm ought to strike us as the real difficulty of democratic theory in the modern regulatory state.<sup>181</sup> For all of these reasons, the political accountability paradigm that dominates American public law should be discarded as a basis for legitimizing specific policy decisions in favor of an enhanced focus on deliberative accountability. The remainder of the Article explains some of the specific implications of this vision of democracy.

#### B. IMPLICATIONS FOR THE STRUCTURE OF AMERICAN PUBLIC LAW

The adoption of a new paradigm of democratic accountability would not necessarily require a dramatic overhaul of existing institutional arrangements in the American regulatory state, but an enhanced focus on deliberative accountability would have significant implications for some of the most vigorously contested issues in modern public law theory and doctrine. First, we could finally move beyond the countermajoritarian difficulty in constitutional law by recognizing that judicial review does not substitute the preferences of an unaccountable judiciary for those of an accountable legislature. The judiciary and the legislature are both accountable in different ways, and at least when it comes to adjudicating cases or controversies that involve alleged violations of individual rights and the enforcement of limitations on governmental authority, there are compelling reasons to prefer the type of accountability that is attributable to an independent judiciary that gives reasoned explanations for its decisions.<sup>182</sup> Moving beyond the counterma-

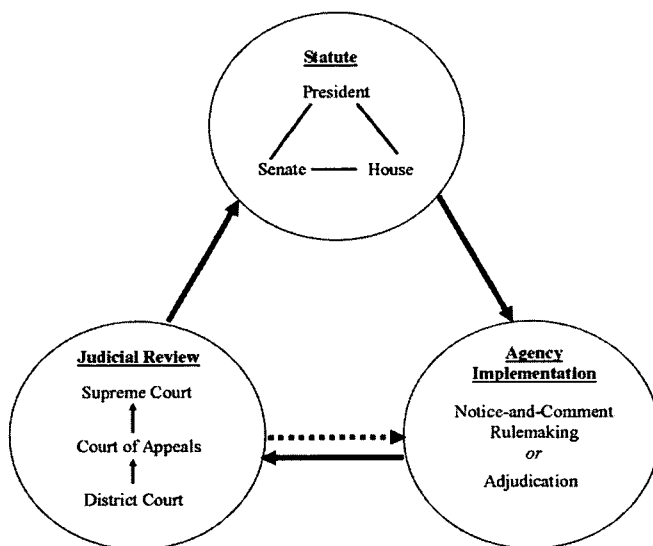
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181. For a theory that treats constitutional principles of liberty, equality, and citizenship as central to democracy, see Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 399 (1997).

182. See, e.g., Chemerinsky, *supra* note 16, at 102 (claiming that "society should have an institution . . . that is not popularly elected or directly electorally accountable identify and protect values that are sufficiently important to be constitutionalized and safeguarded from political majorities" and that "Justices should openly explain and defend their value choices, and thus persuade observers of the best way to understand and apply the Constitution").

goritarian difficulty would allow constitutional theorists to stop worrying about the legitimacy of judicial review and focus instead on how it should be conducted.

Second, instead of viewing the separation of powers as a formal commitment to a strict separation of functions or a functional effort to maintain a proper balance of power among the original three branches,<sup>183</sup> we should envision the entire public law system as what John Braithwaite has called “a checking and balancing circle of deliberative circles.”<sup>184</sup>



Thus, (1) statutes may be enacted to address social problems pursuant to the requirements of bicameralism and presentment;<sup>185</sup> (2) administrative agencies implement their dele-

183. For a compelling argument that the conventional mechanisms for maintaining the separation of powers in American government are incoherent and unhelpful, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

184. John Braithwaite, *Accountability and Responsibility Through Restorative Justice*, in PUBLIC ACCOUNTABILITY, *supra* note 11, at 33, 39–40 (comparing the republican vision of separated powers with a more hierarchical vision).

185. See Staszewski, *supra* note 91, at 1026 (setting forth an understanding of the legislative process whereby “statutes should have an instrumental purpose that promotes the common good”).

gated authority pursuant to the applicable procedures (with the potential influence and oversight of the President and members of Congress);<sup>186</sup> (3) final agency action is subject to judicial review for compliance with the governing law and reasoned decision making;<sup>187</sup> and (4) a subsequent Congress and President can overrule earlier legislative decisions and most of the choices of agencies and the judiciary.<sup>188</sup> Not only are policy decisions made at each stage of this process subject to ongoing review and refinement by officials in other institutions, but each stage of the process is designed in a deliberative fashion.<sup>189</sup> The goal, then, can be understood as facilitating both the checking that is provided by multiple institutions, as well as the deliberation that is conducted within each of them, to legitimize and improve public policy and minimize the likelihood that private parties will be adversely affected by arbitrary governmental action.

From this perspective, the adoption of a strong version of the theory of the unitary executive would clearly be a mistake. This theory relies upon a formal separation of governmental functions that narrowly defines the legislative and judicial roles and leaves a substantial range of policy-making authority to the Chief Executive.<sup>190</sup> The theory also strictly limits the extent to which the legislature and judiciary can legitimately check the executive's activities through congressional oversight or judicial review.<sup>191</sup> The result would be that the executive branch could do virtually whatever it wanted in the vast range

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186. For interesting discussions of the role of administrative procedures in enabling legislative oversight and public-interested regulation, see Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007), and Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000).

187. See *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (establishing a presumption in favor of judicial review of final agency action).

188. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (conducting an empirical study and analysis of the extent to which Congress overrules statutory decisions of the Supreme Court).

189. See *supra* notes 165–68 and accompanying text.

190. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697–98, 704–12 (1988) (Scalia, J., dissenting); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896–97 (1983) (arguing that the judiciary should not interfere with the operation of the political branches except to protect vested individual rights).

191. See, e.g., Calabresi, *supra* note 25, at 50–57 (claiming that congressional oversight and judicial review threaten the President's ability to faithfully execute the laws).

of circumstances in which it executed the law. Because the political accountability that purportedly justifies this arrangement is weak, and the most readily available mechanisms for securing deliberative accountability would be eliminated, the President would, in effect, be able to do whatever he wanted. Not only would this result be as far removed as possible from a checking and balancing circle of deliberative circles (more like an omnipotent dot), but it would also provide a perfect recipe for arbitrary governmental action.

Third, an enhanced focus on deliberative accountability would have clear implications for the most pressing debates in contemporary administrative law. Specifically, executive-branch agencies should continue to be required to give reasoned explanations for their policy decisions that are subject to meaningful judicial review, even when those decisions are made at the behest of the President. While deference is appropriate when agencies with expertise reach their decisions by a sufficiently deliberative process, the judiciary should continue to ensure that an administrative agency's exercise of delegated authority is supported by reasoned explanations. This means that (1) hard-look judicial review should continue to govern discretionary policy choices;<sup>192</sup> (2) the second step of *Chevron* should largely replicate this analysis and therefore turn on whether the agency engaged in reasoned decision making;<sup>193</sup> (3) the procedural safeguards that precede an agency's interpretive decisions should have a bearing on whether it is entitled to deference under the *Chevron* framework;<sup>194</sup> (4) prior judicial in-

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192. See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (adopting the hard-look standard of judicial review); see also Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 484–90 (1997) (claiming that the undesirable effects of hard-look judicial review are likely outweighed by its considerable benefits, which include “the need to ensure that agencies act not only within acceptable legal and political bounds, but also exercise their discretion in a deliberative manner”).

193. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55, 1263–77 (1997) (endorsing this approach and finding evidence of its use by the D.C. Circuit); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 83 (1994) (“[D]eliberative democracy suggests a modification of *Chevron* which would place the emphasis on the second rather than the first *Chevron* step, thereby forcing agencies to explain why their interpretations are good policy in light of the purposes and concerns underlying the statutory scheme.”).

194. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding

interpretations of ambiguous statutory provisions should not trump well-reasoned agency decisions to the contrary under *Chevron*;<sup>195</sup> and (5) the modern *Skidmore* standard that applies in most other circumstances sensibly requires the judiciary to evaluate the quality and degree of an agency's deliberative accountability in assessing how much respect should be accorded to its interpretive decisions.<sup>196</sup> Most fundamentally, legislative delegations of authority to executive agencies should be understood as providing final decision-making authority to agency officials, rather than to the President, based on their superior deliberative accountability in the vast majority of circumstances.<sup>197</sup>

Although the foregoing conclusions are basically consistent with existing judicial precedent,<sup>198</sup> the current regulatory process and administrative law doctrines are by no means perfect. For example, the APA's exemptions from notice-and-

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that an agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"; *id.* at 227 (explaining that the foregoing standard will generally be met when an agency interpretation is rendered pursuant to formal adjudication or notice-and-comment rulemaking); *see also* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying *Chevron* deference to an agency interpretation rendered in an opinion letter).

195. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding that a prior judicial construction only trumps an agency's interpretation under *Chevron* if the court held that its construction was mandated by the unambiguous terms of the statute and explaining that a contrary rule would unnecessarily "preclud[e] agencies from revising unwise judicial constructions of ambiguous statutes").

196. The "*Skidmore* factors," which are perhaps taking on increased practical significance, provide a nice laundry-list of what it takes to achieve deliberative accountability: (1) thorough consideration; (2) participatory and deliberative procedures; (3) the application of expertise; (4) valid reasoning; and (5) consistent treatment of regulated parties (with reasoned explanations for any changes in the regulatory course). *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For an informative description of the judiciary's application of these factors, *see* Kristin E. Hickman & Matthew D. Krueger, *In Search of the "Modern" Skidmore Standard*, 108 COLUM. L. REV. 1235 (2007).

197. *But cf.* Kagan, *supra* note 25, at 2251, 2326–31 ("[A] statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion.").

198. It bears noting, however, that the current status of hard-look judicial review and its relationship to the second step of the *Chevron* analysis is not entirely clear. *See* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 308–25 (2004). The degree of respect that should be accorded to agency interpretations under *Skidmore* is also still in a great deal of flux. *See* Hickman & Krueger, *supra* note 196, at 1237.

comment rulemaking are arguably too broad because several of the exempted categories of decision making would substantially benefit from public deliberation.<sup>199</sup> Judicial decisions that limit the standing of regulatory beneficiaries to challenge the validity of agency action are also problematic because they remove an important incentive for agencies (as well as courts) to give sufficient consideration to a crucial perspective in the formulation of public policy.<sup>200</sup> In addition to concerns about the disparate treatment of similarly situated parties, the presumption against judicial review of non-enforcement decisions is also problematic for essentially the same reasons.<sup>201</sup> The potential advantages of regulated entities over regulatory beneficiaries in an unregulated administrative process and related forms of arbitrary decision making are likely to be exacerbated (and deliberative accountability undermined) by the absence of restrictions on ex parte contacts in informal rulemaking.<sup>202</sup> On a much broader level, although White House coordination and review of regulatory policy making can be beneficial in various ways, there is a real need to consider the extent to which safeguards can feasibly be provided to prevent similar abuses of this power.<sup>203</sup> There are no easy solutions to the foregoing prob-

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199. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 402–03 (2007) (claiming that the case for procedural reform of informal agency policymaking is significantly bolstered by a recognition of the need for adequate consideration of the interests and perspectives of regulatory beneficiaries).

200. For a prominent example of a decision that restricts the standing of regulatory beneficiaries to seek judicial review, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For critical commentary, see Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1692 (2004) (claiming that the Court's standing doctrine facilitates faction by giving regulated entities more power to challenge agency action than regulatory beneficiaries and thereby making it "more likely that agencies will respond to private or political pressure rather than public welfare"); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186–88, 195–96 (1992) (criticizing the Court for disfavoring regulatory beneficiaries in this context).

201. See Bressman, *supra* note 200, at 1692 (explaining that the nonreviewability doctrine has the same negative impact as limitations on the standing of regulatory beneficiaries); *supra* note 44.

202. Compare *Sierra Club v. Costle*, 657 F.2d 298, 400–02 (D.C. Cir. 1981) (holding that ex parte contacts between an agency and interested parties did not violate the governing statute or the informal rulemaking procedures of the APA), with *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51–59 (D.C. Cir. 1976) (invalidating regulations promulgated by an agency on the basis of undisclosed ex parte contacts).

203. See, e.g., William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 ADMIN. L. REV. 611, 615 (2002)



lems that could be fully articulated here, but recognition of the weaknesses of the political accountability of the President and the potential significance of a requirement or expectation that public officials give reasoned explanations for their policy decisions helps to explain why we should care.

Fourth, an enhanced focus on deliberative accountability would have significant implications for the appropriate methodologies of statutory interpretation in other contexts. Virtually everyone agrees that the plain meaning of a statutory text should control when there is no constitutional difficulty and Congress explicitly resolved the relevant issue in the legislative process.<sup>204</sup> Most commentators also agree that identifiable legislative bargains should be enforced by the judiciary in the absence of significant constitutional difficulties.<sup>205</sup> The advocates of competing interpretive methodologies tend to part ways, however, when it comes to resolving the seemingly unanticipated problems that could otherwise arise when a law is applied to particular circumstances.<sup>206</sup> They also tend to disagree about when statutory ambiguity exists, and which potential sources of meaning should be used to resolve it.<sup>207</sup>

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(suggesting that external checks would be useful “to guard against potentially inappropriate . . . influence over the rulemaking process”); Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 ADMIN. L. REV. 853, 855 (2002) (arguing that “agencies and the White House should reveal private communications of central relevance” to rulemaking proceedings).

204. See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation*, 101 COLUM. L. REV. 990, 1090–91 (2001).

205. See Molot, *supra* note 36, at 31 (explaining that central tenets of textualism have resonated with mainstream judges and scholars “who generally accept that courts should be faithful to legislative instructions and follow laws enacted through bicameralism and presentment rather than make new laws themselves”).

206. See Eskridge, *supra* note 204, at 1090–92 (claiming that the unwillingness to consider other contextual evidence when a judge discerns a plain statutory meaning from textual sources is an innovation of strict textualism “that represents a significant departure from the Court’s practice in the twentieth century, and is [in]consistent with the original understandings of Article III”); Manning, *supra* note 34, at 20–27 (explaining that the contrast between strong purposivism and textualism only comes into play when the statutory text is unambiguous); Staszewski, *supra* note 91, at 1025–27 (explaining that “theoretical differences between the new textualism and civic republican understandings of the legislative process and constitutional structure lead to competing conceptions of the judicial role” when “legislative generality produces a problematic outcome that was unforeseen by the legislature”).

207. See Molot, *supra* note 36, at 36–39, 44–48 (analyzing the unresolved areas of disagreement between “aggressive textualists” and the adherents of other theories of statutory interpretation).

Generally speaking, strict textualists believe that ambiguity only exists when at least two linguistically plausible meanings remain after thoroughly examining a statute's semantic context.<sup>208</sup> When this occurs, courts may properly consider the underlying statutory purpose and other policy considerations in choosing from among linguistically permissible meanings, provided that they do not rely upon the legislative history to ascertain what the legislature intended to achieve when it enacted the statute.<sup>209</sup> The judiciary may, in turn, only exercise equitable discretion or avoid absurd results when a chosen interpretation reflects a linguistically permissible resolution of statutory ambiguity, or perhaps when such action is necessary to avoid invalidating a statute on constitutional grounds.<sup>210</sup> Courts must otherwise adhere to the "plain meaning" of statutory language even when it leads to absurd results or other highly problematic outcomes that were seemingly unanticipated by Congress.<sup>211</sup> Odd as it may seem, this is what it allegedly means for courts to fulfill their constitutionally mandated role as "faithful agents" of the legislature.<sup>212</sup>

An explicit motivation for textualism is a belief that policy decisions should only be made by politically accountable officials and that the judiciary should refrain from altering the balance of interests that is reflected by a statute or letting lawmakers off the hook by fixing their mistakes.<sup>213</sup> As explained above, the "political accountability" of lawmakers may be a harmless fiction to the extent that it encourages the judiciary to respect Congress's authority when it has explicitly re-

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208. See Manning, *supra* note 33, at 2463 (claiming that statutory ambiguity only exists when "a given phrase has several relevant social connotations"); see generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (distinguishing textualism from purposivism on the grounds that textualists emphasize semantic context over policy context and vice versa).

209. See Manning, *supra* note 208, at 84–85 ("[W]hen a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose.").

210. See Manning, *supra* note 33, at 2462–63 ("For textualists, the prerequisite for employing a contextual interpretation to avoid absurdity is the existence of a relevant and established social nuance to the usage of the word or phrase in context." (emphasis omitted)); see also Manning, *supra* note 34, at 115–19 (discussing Justice Scalia's efforts to limit the absurdity doctrine to circumstances "in which the more natural textual meaning would pose serious constitutional questions under the rational-basis test").

211. See *supra* notes 33–35 and accompanying text.

212. See *id.*

213. See *supra* notes 36–37 and accompanying text.

solved a policy question,<sup>214</sup> but the idea that lawmakers are politically accountable for their specific policy decisions becomes problematic when it is used as a justification to limit the judiciary's interpretive authority over questions that were apparently never considered or consciously resolved in the legislative process. In the latter circumstances, strict reliance on the plain meaning of the statutory text will have a tendency to promote random and potentially arbitrary outcomes because the range of textually plausible meanings may itself be a function of happenstance. When a statute's plain meaning is deemed unambiguous after an examination of its semantic context, the resulting interpretation will also be random and potentially arbitrary to the extent that its policy consequences were never explicitly considered by the legislature or the judiciary.<sup>215</sup> This problem is only exacerbated by a court's refusal to consider a statute's policy context when Congress was pursuing an identifiable goal.<sup>216</sup> The new textualism therefore ultimately promotes arbitrary outcomes and purports to limit the judiciary's discretion in a manner that would practically guarantee that there is *no political or deliberative accountability* for a substantial number of policy decisions that profoundly affect people's lives.<sup>217</sup>

The best way to avoid arbitrary governmental action and promote democratic accountability in statutory interpretation is to recognize that ambiguity exists whenever Congress does not explicitly resolve a particular issue in the legislative

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214. See *supra* text accompanying notes 154–55.

215. See WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 243–44 (2d ed. 2006) (explaining that textualism poses a risk of “creating a law without mind” (internal quotations omitted)).

216. See Molot, *supra* note 36, at 54 (“Where judges refuse to consider statutory purposes, they make it that much harder for the people’s elected representatives to accomplish their goals.”).

217. The legislature’s subsequent opportunity to amend a statute to overrule the judiciary’s decision could result in valuable political deliberation about the policy question at issue, but it would not ordinarily eliminate the arbitrary judicial decision that was previously rendered. It therefore seems preferable for the judiciary to render a reasoned decision in the first instance, which still allows Congress to amend the statute to reach a different outcome if it so chooses. Cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–16 (1991) (Stevens, J., dissenting) (recognizing that Congress has the power to correct the judiciary’s “mistakes” in statutory interpretation, but claiming that “we do the country a disservice when we needlessly ignore persuasive evidence of Congress’s actual purpose and require it ‘to take the time to revisit the matter’ and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error” (citation omitted)).

process.<sup>218</sup> A sensible way to inform this threshold determination in a deliberative democracy is to examine what elected representatives said in the legislative process when the statute was enacted.<sup>219</sup> When ambiguity is apparent from the face of a statute or the problematic consequences that would otherwise result from a seemingly unanticipated application of the law, a court should consider whether the statute's underlying purposes would be served by applying it to the situation at hand and what effect this course of action would have on other widely accepted public values and constitutional norms.<sup>220</sup> This approach would allow the judiciary to exercise the equitable discretion that is needed to avoid absurd results and other highly problematic outcomes that were not anticipated by the legislature and to serve as a "cooperative partner" in the ongoing elaboration of the law when elected representatives have not explicitly resolved a particular question.<sup>221</sup> It would also facilitate deliberative accountability because courts will almost certainly give reasoned explanations for these particular decisions and elected representatives are always free to amend the law in response.

Finally, a better understanding of the concept of democratic accountability would call the continued legitimacy of the existing ballot initiative process into question, regardless of whether a political accountability or deliberative accountability paradigm is predominant. The initiative proponents who control the precise legal consequences of this process are neither politically accountable to the voters nor expected to give reasoned explanations for their decisions. Nor do sufficient structural safeguards currently exist to entitle the final results of this process to any special degree of respect.<sup>222</sup> I have therefore

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218. See Staszewski, *supra* note 91, at 1045 (distinguishing between "known imprecision" and unanticipated problems that periodically arise in statutory interpretation).

219. See Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 250–52 (1998) (recognizing that the new textualism's refusal to consult legislative history is in tension with a constitutional structure that is designed to facilitate reasoned deliberation).

220. Cf. Staszewski, *supra* note 91, at 1047–55 (describing the general parameters of the absurdity doctrine in statutory interpretation).

221. See Eskridge, *supra* note 204, at 991 ("Academic debates about statutory interpretation methodology have increasingly involved competing 'faithful agent' versus 'cooperative partner' understandings of the role of federal judges.").

222. See Eule, *supra* note 41, at 1503, 1549–55; Staszewski, *supra* note 38,

previously advocated reforms that would help to clarify the specific legal consequences of proposed ballot measures for the voters and encourage the initiative proponents to engage in reasoned deliberation during the lawmaking process.<sup>223</sup> Specifically, the judiciary could adopt substantive canons of statutory interpretation that would narrowly construe ambiguous ballot measures in certain situations to avoid potentially manipulative behavior by initiative proponents and promote republican principles of government.<sup>224</sup> Moreover, the same basic structural safeguards that compel federal administrative agencies to engage in reasoned decision making when they promulgate regulations could be adopted in the initiative context.<sup>225</sup> Both proposals could improve the political accountability of the initiative process by enabling the voters to express their preferences more accurately.<sup>226</sup> The application of an agency model to direct democracy would also promote deliberative accountability in this context by requiring the initiative proponents to consider competing perspectives and give reasoned explanations for their specific policy decisions that are subject to judicial review.<sup>227</sup> In the meantime, it is important to dispel the notion that the existing ballot initiative process is “democracy in

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at 398; *supra* Part IV.A (explaining the moderating role of structural safeguards on deliberative accountability).

223. See Staszewski, *supra* note 88, at 39–59.

224. See Frickey, *supra* note 87, at 517, 522 (advocating the establishment of a strong preference for continuity in the ballot initiative context based on republican principles of government, whereby “pre-existing law is displaced by the ballot proposition only when the clear text or evident, core purposes of the electorate so requires”); Schacter, *supra* note 39, at 156–61 (advocating the narrow interpretation of ambiguous language when it seems especially likely that a ballot measure was tainted by the manipulation of “highly organized, concentrated, and well-funded interests”); Staszewski, *supra* note 88, at 45–55 (endorsing the foregoing proposals and claiming that courts should also “narrowly construe ambiguous ballot measures in accordance with the campaign statements of their proponents”).

225. See Staszewski, *supra* note 38, at 447–59 (proposing the application of an “agency model” to direct democracy and explaining what this reform would entail).

226. See Staszewski, *supra* note 88, at 69–70.

227. Cf. Staszewski, *supra* note 38, at 459 (suggesting that such reforms would “encourage meaningful deliberation and reasoned decisionmaking” as well as “hold initiative proponents accountable for their actions during the lawmaking process”). The substantive canons of statutory interpretation that are endorsed above would also promote deliberative accountability by helping to clarify the specific legal consequences of proposed ballot measures (thereby potentially enabling reasoned deliberation about their merits) and leaving the resolution of collateral policy issues to more deliberative lawmaking processes. See Frickey, *supra* note 87, at 517–27; Staszewski, *supra* note 88, at 72.

its purest form,"<sup>228</sup> and to recognize instead that it is a highly problematic form of lawmaking precisely because the relevant decision-makers are not democratically accountable in any meaningful way for their actions.

### C. IMPLICATIONS FOR INDIVIDUAL RIGHTS IN AMERICAN PUBLIC LAW

Replacing the political accountability paradigm that currently dominates American public law with an enhanced focus on deliberative accountability would also have tangible implications for certain individual rights in our democracy. Although countless examples could be offered,<sup>229</sup> this section focuses on the debate over the legal status of same-sex marriage in the United States. Aside from its status as one of the most hotly contested issues of public policy, this particular example is illuminating for two reasons. First, the proper legal treatment of same-sex marriage is relatively clear under the existing paradigm—namely, prohibition in accordance with the will of a majority. Second, an enhanced focus on deliberative accountability leads to a different way of thinking about the issue and perhaps different, or, at least more nuanced, conclusions.

This Article has explained that the political accountability paradigm that dominates contemporary public law is generally a fiction because most voters (1) are unaware of specific policy issues; (2) do not have meaningful preferences regarding their resolution; (3) are unaware of who is responsible for various policy decisions; and (4) do not (and cannot) cast election ballots on a sufficiently finely tuned, retrospective, issue-oriented basis.<sup>230</sup> Same-sex marriage may, however, be the exception that proves the rule: almost everyone is aware of this issue, and many citizens have strong preferences on how it should be resolved, an ability to attribute some responsibility for relevant decisions, and a propensity to vote partly on the basis of the foregoing preferences and information.<sup>231</sup> Unlike most other

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228. See *supra* note 39 and accompanying text.

229. See, e.g., GUTMANN & THOMPSON, *supra* note 7, at 230–345 (articulating deliberative conceptions of liberty, welfare, and fair opportunity); Cohen, *supra* note 92, at 185, 201–21 (setting forth deliberative conceptions of religious, expressive, and moral liberty).

230. See *supra* Part II.

231. Even this concession may give too much credit to standard notions of political accountability. In this regard, survey evidence of the salience of the issue of same-sex marriage to voters is mixed. See Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative*

policy issues, the existing paradigm of public law could therefore be applied to the legal treatment of same-sex marriage in a relatively meaningful and straight-forward fashion.

From a political-accountability perspective, the recent wave of ballot initiatives that limit eligibility for marriage to heterosexual couples represents a triumph of democracy.<sup>232</sup> Moreover, it is entirely appropriate that legislatures throughout the country would enact similar restrictions.<sup>233</sup> Nor is it surprising that a President would advocate a constitutional amendment that would prevent the judiciary and state governments from deviating from this norm.<sup>234</sup> If it were not for countermajoritarian features that make it extremely difficult to amend the Federal Constitution, Congress and the people of the states may very well have enacted this proposal.<sup>235</sup> In any event, again from this perspective, the federal judiciary would

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*Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219, 220–21, 223 & n.21 (2006) (explaining that there was no political backlash against politicians who supported the recognition of same-sex marriage in Massachusetts and concluding from an evaluation of survey evidence from Gallup and Pew that “[t]he salience of the same-sex marriage issue is subject to dispute, both in relation to the election, as discussed, and more generally”).

232. See, e.g., *Standhardt v. Superior Court*, 77 P. 3d 451, 465 (Ariz. Ct. App. 2003) (“[I]t is for the people of Arizona, through their elected representatives or by using the initiative process, rather than this court, to decide whether to permit same-sex marriages.”); Maggie Gallagher, *Aloha Chorus for Gay Marriage Debate*, WASH. TIMES, Apr. 22, 1997, at A15 (“Hawaii’s graceful, commonsense solution [of amending the state constitution to allow the legislature to reserve marriage to opposite-sex couples] represents both a rebuke to power-hungry judges and an object lesson in how much better off we are when difficult political issues are left to the political process.”); see also Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking By Direct Democracy*, 78 S. CAL. L. REV. 949, 971 (2005) (“In the November 2004 election, eleven states (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah) considered defense of marriage initiatives, and they all passed.”).

233. See Jacobi, *supra* note 231, at 222 (pointing out that twelve of the thirteen states that recently enacted constitutional amendments to prohibit same-sex marriage “already had both laws banning same-sex marriage and state Defense of Marriage Acts, which prevented recognition of out of state same-sex marriages”).

234. See Press Release, George W. Bush, President of the U. S., President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.politicalvideo.org/george-bush-calls-constitutional-amendment-protecting-marriage>.

235. See U.S. CONST. art. V. The Federal Marriage Amendment died in the Senate when it failed to receive the two-thirds majority required in each chamber of Congress to propose a constitutional amendment. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE* 39–41 (2006) (describing the proceedings).

plainly have no business interfering with the legitimate policy choices of the people and their elected representatives to prohibit the legal recognition of same-sex marriage.<sup>236</sup>

The most striking aspect of this perspective is that the reasons for the majority's policy choice and its resulting impact on minorities make very little difference. Although the judiciary could subject a legal prohibition on same-sex marriage to heightened scrutiny on the grounds that it undermines a fundamental right or adversely affects a suspect class,<sup>237</sup> this course of action would epitomize the countermajoritarian difficulty. Because the political accountability paradigm posits that lawmaking should reflect the will of the people and remain undiluted by the contrary personal preferences of politically unaccountable judges,<sup>238</sup> legal prohibitions on same-sex marriage should be adopted and upheld regardless of their substantive merits.

An enhanced focus on deliberative accountability would fundamentally reject this type of thoughtless deference to (potentially thoughtless) majoritarian preferences. The relevant legal and policy question would become whether prohibitions on same-sex marriage are justified by public-regarding reasons that could reasonably be accepted by free and equal citizens with competing perspectives. This question should, of course, initially be resolved in the legislative process where prohibitions on same-sex marriage are initially considered. It would therefore become necessary for lawmakers to evaluate the competing arguments regarding same-sex marriage that have been offered by participants in this debate and to justify their positions with reasoned explanations.

The leading arguments against same-sex marriage have evolved over time as the possibility of changing the traditional status quo has been taken more seriously.<sup>239</sup> The first generation of arguments relied on the traditional definition of marriage to reject the possibility of a legally sanctioned union be-

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236. *Cf. Romer v. Evans*, 517 U.S. 620, 651–52 (1996) (Scalia, J., dissenting) (criticizing the majority's decision to invalidate a state constitutional amendment that would prevent Colorado from taking any action to protect gays and lesbians and claiming that "courts (as opposed to the political branches)" have "no business" taking sides in a "culture war").

237. *See, e.g., Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (describing the conventional reasons for heightened judicial scrutiny).

238. *See supra* Part I.

239. *See* ESKRIDGE & SPEDALE, *supra* note 235, at 20–31 (describing the evolving opposition to same-sex marriage in the United States).



tween two persons of the same sex.<sup>240</sup> Because this argument is obviously circular and therefore completely unpersuasive, opponents of same-sex marriage have proceeded to articulate moral arguments against legal reform in this area. These arguments are typically rooted in sincerely held interpretations of religious doctrine or based on an aversion toward homosexual persons or their behavior.<sup>241</sup> As such, they are not, standing alone, public-regarding reasons for prohibiting same-sex marriage that could reasonably be accepted by free and equal citizens with competing perspectives.

Partly for this reason—and the related need to convince relatively impartial courts and political moderates of the validity of their position—opponents of same-sex marriage have begun to place greater emphasis on the consequential arguments that are allegedly in their favor.<sup>242</sup> For example, they routinely contend that the legal recognition of gay and lesbian unions would be the first step down a slippery slope that would ultimately foreclose legal prohibitions on minors entering into marriage, polygamy, incest, and even bestiality.<sup>243</sup> Similarly, they claim that the legal recognition of same-sex marriage would destroy traditional marriage and thereby harm the increasing number of children who would grow up in single-parent families or with two cohabiting parents.<sup>244</sup>

If these claims were consistent with the available empirical information and otherwise persuasive, they would count as

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240. See *id.* at 21–22. For an example of a judicial decision that upheld the validity of a legal prohibition of same-sex marriage solely on these grounds, see *Jones v. Hallahan*, 501 S.W.2d 588, 589–90 (Ky. 1973).

241. See ESKRIDGE & SPEDALE, *supra* note 235, at 23–24. For a leading federal decision that relies upon traditional definitions and religious authority to justify a refusal to recognize same-sex marriage, see *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982).

242. See ESKRIDGE & SPEDALE, *supra* note 235, at 25–30.

243. See *id.* at 24 (describing the “slippery slope” argument and observing that it has “become almost boilerplate in speeches or books that oppose same-sex marriage”).

244. For influential renditions of the “defense of marriage” argument against same-sex marriage, see G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 565–72 (1985); Teresa Stanton Collett, *Should Marriage Be Privileged?: The State's Interest in Childbearing Unions*, in MARRIAGE AND SAME-SEX UNIONS 152, 152–61 (Lynn D. Wardle et al. eds., 2003); Maggie Gallagher, *Normal Marriage: Two Views*, in MARRIAGE AND SAME-SEX UNIONS, *supra*, at 13, 13–24; see also ESKRIDGE & SPEDALE, *supra* note 235, at 28–31 (describing the objection and explaining its contemporary popularity).

public-regarding reasons for prohibiting same-sex marriage in a deliberative democracy. Yet, the slippery-slope argument is not supported by the experience of a single jurisdiction that has legally recognized same-sex marriage or registered partnerships. An increasing number of foreign countries and a few states have already recognized the legality of same-sex unions, but there has not been any serious movement toward eliminating existing age of consent laws or prohibitions on polygamy, incest, or bestiality in any of those jurisdictions.<sup>245</sup> Moreover, restrictions on the ability of minors to enter into marriage and legal prohibitions of bestiality and some forms of incest are distinguishable from the legal recognition of same-sex marriage and registered partnerships based on the existence *vel non* of valid consent.<sup>246</sup> Finally, while same-sex marriage and registered partnerships recognize a mutual commitment between the participants, polygamy necessarily places one member of the relationship on a different and evidently superior footing and is therefore arguably distinguishable on this basis.<sup>247</sup>

The “defense of marriage” argument is based on the underlying premise that “the great virtue of marriage is the creation of an altruistic space, where adults sacrifice their own self-interest in the service of mutual commitment to one another and to children they raise together.”<sup>248</sup> The proponents of this argument maintain that traditional marriage has declined because this ideal has been sacrificed by liberalizations that treat marriage as just another avenue for seeking self-fulfillment and pleasure.<sup>249</sup> The legal recognition of same-sex marriage would allegedly render the liberal conception of marriage victorious and constitute the proverbial straw that broke traditional

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245. See ESKRIDGE & SPEDALE, *supra* note 235, at 36, 169–72.

246. Cf. Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 337 & n.2 (2004) (evaluating how *Lawrence v. Texas* affects laws regulating other forms of sexual behavior, including consensual adult incest, but expressly excluding “behavior that is not consensual or where one or more of the persons involved is not adult” from this inquiry); see also ESKRIDGE & SPEDALE, *supra* note 235, at 24 (distinguishing prohibitions on same-sex marriage from age of consent laws on the grounds that “[m]inors are not mature enough to consent”).

247. See Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 169 (2006) (“[I]nternational law has deemed polygamy an offense against equality.”); see also ESKRIDGE & SPEDALE, *supra* note 235, at 24 (distinguishing legal prohibitions on same-sex marriage from prohibitions of polygamy on the grounds that “polygamy is a terrible legal regime from women’s point of view”).

248. ESKRIDGE & SPEDALE, *supra* note 235, at 29.

249. See *supra* note 244 and accompanying text.

marriage's back.<sup>250</sup> The demise of traditional marriage would, in turn, lead to more children being born and raised out of wedlock, thereby causing irreparable harm to society's most vulnerable political minority.<sup>251</sup>

This argument is analytically flawed because same-sex couples can, and do enter into relationships that comport with the traditional ideal of marriage. Although such couples cannot give birth to their own biological children, they could raise the biological children of one parent and other children obtained through adoption.<sup>252</sup> And, obviously, heterosexual couples (as well as same-sex couples) are sometimes unwilling or unable to raise children; parenting is not a mandatory requirement of marriage.<sup>253</sup> Moreover, the link between the liberal demise of traditional marriage and the legal recognition of same-sex marriage is a non sequitur.<sup>254</sup> The traditional family has declined primarily because of legal reforms that were designed to protect cohabitation and make it easier for heterosexual couples to obtain divorces. Expanding the group of citizens who are eligible to enter into marriage would neither facilitate cohabitation nor make it easier to dissolve existing marriages. On the contrary, the legal recognition of same-sex marriage or registered part-

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250. See, e.g., H.R. REP. NO. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919–21 [hereinafter HOUSE REPORT].

251. See, e.g., *id.* at 2913, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917 (“At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”); Gallagher, *supra* note 244, at 19 (claiming that “same-sex marriage puts at risk” the basic ideal that “marriage is about . . . the reproduction of children and society” and “the presumption that children need mothers and fathers, and that marriage is the way in which we do our best to get them for children”); see also ESKRIDGE & SPEDALE, *supra* note 235, at 30 (pointing out that the defense of marriage argument draws some of its broad appeal from the underlying notion that “[t]he most vulnerable minority is the children, and if there is the slightest risk that homosexual marriage would hurt the children, that should suffice”).

252. See *Baker v. State*, 744 A.2d 864, 881–82 (Vt. 1999) (canvassing data on the increasing number of children who are being raised by same-sex parents through assisted-reproductive techniques and adoption).

253. See *id.* (concluding that the state's asserted interest in “furthering the link between procreation and child rearing” was insufficient to justify denial of the legal benefits of marriage to same-sex couples because this statutory exclusion was significantly over- and under-inclusive); HOUSE REPORT, *supra* note 250, at 2914, *reprinted in* U.S.C.C.A.N. 2905, 2918 (“[S]ociety has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.”).

254. See ESKRIDGE & SPEDALE, *supra* note 235, at 180–89 (articulating a more fully developed version of this argument).

nerships would presumably increase the number of "married" couples, as well as the number of children who are raised by two parents who are married to one another.

Not surprisingly, the defense of marriage argument is also questionable as an empirical matter. Proponents of the argument have claimed that the legal recognition of registered partnerships in Scandinavia has caused a decline in marriage and an increase in the number of children born and raised out of wedlock in those countries.<sup>255</sup> William Eskridge and Darren Spedale have recently maintained, however, that this claim is unsupported by a close examination of the data.<sup>256</sup> Rather, Eskridge and Spedale claim that the data fully supports the analysis in the preceding paragraph.<sup>257</sup> In any event, there is no reputable empirical evidence that children raised by two parents of the same sex are worse off than children raised by two parents of the opposite sex.<sup>258</sup> Indeed, while there is reliable statistical evidence that being raised by a single parent is not in the best interest of children,<sup>259</sup> the benefits of having two parents appear to accrue to the children regardless of whether their parents are married.<sup>260</sup> Accordingly, while the research is un-

255. See Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Feb. 2, 2004; Stanley Kurtz, *Slipping Toward Scandinavia*, NAT'L REV. ONLINE, Feb. 2, 2004, <http://www.nationalreview.com/kurtz/kurtz200402020917.asp>.

256. See ESKRIDGE & SPEDALE, *supra* note 235, at 169–202.

257. See *id.* at 131–67, 173–79.

258. See Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 278 (claiming that the social science literature does not support the view that children raised by gays and lesbians are harmed by the sexual orientation of their parents); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001) (identifying certain limitations in the existing literature, but reporting that most research in psychology "reports findings of no notable differences between children reared by heterosexual parents and those reared by lesbian and gay parents, and that it finds lesbian parents to be as competent and effective as heterosexual parents").

259. See generally SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* (1994) (compiling statistical data that demonstrates that children who grow up with only one parent in the household have a harder time making the transition from adolescence to adulthood); JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE* (2000); Sharon K. Houseknecht & Jaya Sastry, *Family "Decline" and Child Well-Being: A Comparative Assessment*, 58 J. MARRIAGE & FAM. 726 (1996) (comparing varying degrees of family decline in the United States, Sweden, Switzerland, and New Zealand).

260. See, e.g., GUNILLA RINGBÄCK WEITTOFT, *LONE PARENTING, SOCIOECONOMIC CONDITIONS AND SEVERE ILL-HEALTH* (2003) (finding that children

doubtedly in a preliminary state, the defense of marriage argument against same-sex marriage appears at this time to amount to nothing more than unwarranted speculation.

Based on the foregoing analysis, there does not appear to be any valid reason for prohibiting same-sex marriage that could reasonably be accepted by free and equal citizens with competing perspectives. In other words, if gay and lesbian couples want to create “an altruistic space, where adults sacrifice their own self-interest in the service of mutual commitment to one another and to children they raise together,”<sup>261</sup> why shouldn’t a republican democracy let them? This conclusion holds, moreover, without even considering the unusually strong interests of gay and lesbian couples who would like to enter into legally valid marriages. First, such couples seek access to a legal right that the Supreme Court has already declared fundamental in our society.<sup>262</sup> Second, they seek to be treated the same as heterosexual couples who can freely enter into marriage.<sup>263</sup> Third, they seek access to the multitude of rights, benefits, and obligations that result from entering into a legally valid marriage.<sup>264</sup> Lawmakers in a democracy should ordinarily pause before adopting any policy that denies a single group liberty, equality, and material benefits, but such action should be a non-starter when no valid considerations appear on the other side of the ledger.

Eskridge and Spedale have recognized, however, that the true reason for widespread opposition to the legal recognition of same-sex marriage may stem from what they refer to as “the politics of disgust.”<sup>265</sup> In other words, regardless of what they

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raised by two cohabiting or married parents, including parents who live with a partner who is unrelated to the child, are better off along a variety of important measures than children raised by “lone parents”). There is a potential concern, however, that cohabiting parents are more likely to split up, resulting in a lone-parent family. The legal recognition of same-sex marriage would, of course, have a tendency to alleviate this concern, in addition to increasing the number of children who are raised in a household with two parents. See ESKRIDGE & SPEDALE, *supra* note 235, at 197–99 (explaining that Weitoft’s study, which is heavily relied upon by some opponents of same-sex marriage, can be utilized to support its legal recognition).

261. See ESKRIDGE & SPEDALE, *supra* note 235, at 29.

262. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

263. See, e.g., ESKRIDGE & SPEDALE, *supra* note 235, at 13.

264. For a recent compilation of those rights and obligations under federal law, see U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (identifying 1138 federal laws in which marital status is a factor).

265. See ESKRIDGE & SPEDALE, *supra* note 235, at 220–28 (explaining that

say, many people vehemently oppose same-sex marriage because they find homosexual people or their behavior repulsive. Although this “disgust” is certainly not a public-regarding reason for prohibiting same-sex marriage that could reasonably be accepted by free and equal citizens with a competing perspective, there is a less pejorative way of describing the underlying concern. Specifically, the concern appears to be that the legal recognition of same-sex marriage would eliminate a deeply felt need for “boundaries” that is an essential aspect of the self-definition of certain individuals.<sup>266</sup> Simply put, for some people, the legal recognition of same-sex marriage would “rock their world” in a particularly upsetting way.

On one hand, this more neutral-sounding explanation for opposition to same-sex marriage may be a fancy way of trying to justify rank prejudice or the imposition of some people’s religious beliefs upon others.<sup>267</sup> On the other hand, it also illustrates the potential importance of respecting the spiritual beliefs and cultural norms of different citizens to the extent reasonably possible in the formation of public policy.<sup>268</sup> In this regard, Eskridge and Spedale draw an analogy between this opposition toward same-sex marriage and the likely attitude of Native Americans who have their sacred land condemned by the government for public purposes.<sup>269</sup> The implication is that spiritual beliefs and cultural norms of this nature are real, legitimate, and entitled to a reasonable degree of respect from citizens with fundamentally different perspectives.

This discussion highlights the occasional difficulty of clearly defining a public-regarding reason that could reasonably be accepted by free and equal citizens with competing perspectives. It also marks a specific debate that participants in the controversy over the legality of same-sex marriage should be

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“a *politics of disgust* is one that is driven by . . . emotional responses,” rather than “rational analyses and argumentation”).

266. See *id.* at 223–25; see also MARY DOUGLAS, *PURITY AND DANGER* (1966) (recognizing the role of boundary maintenance that is served by disgust).

267. See William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1048 (2005) (“[D]isgust-based regulatory schemes tend to sacrifice the liberties of the minority in pursuit of goals that are often not linked to the common good.”).

268. Cf. GUTMANN & THOMPSON, *supra* note 7, at 84–85 (advocating an “economy of moral disagreement” in which “citizens should seek the rationale that minimizes rejection of the position they oppose” when “justifying policies on moral grounds”).

269. See ESKRIDGE & SPEDALE, *supra* note 235, at 224–25.

having.<sup>270</sup> This debate need not be definitely resolved at this time, however, because there is an available compromise that could generate deliberative agreement on an appropriate solution. In particular, registered partnerships or civil unions would provide gay and lesbian couples with most of the legal rights, benefits, and obligations of traditional marriage. Moreover, the availability of this legal status would go a long way toward equalizing the treatment that is provided to couples with different sexual orientations in our society and extending the fundamental right to “marry.” Meanwhile, it would preserve a meaningful boundary that is important to some people for sincerely held moral or cultural reasons, and provide a basis for further empirical study. While these particular solutions might not give all the people (or any person) precisely what they want, that is quite often the nature of a principled, deliberative compromise.

One might object that a theory that emphasizes reasoned deliberation about the merits of policy choices should not resort to pragmatic solutions that avoid difficult substantive questions. Such an objection misunderstands the position in the same-sex marriage debate that is indefensible. Although there is no valid reason for declining to extend a meaningful form of legal recognition to same-sex couples, there are a variety of valid perspectives regarding the most appropriate solution. Indeed, the gay rights community is split over whether “marriage” itself is the most appropriate solution or whether the creation of a new legal partnership arrangement that is free from the historical “baggage” of traditional marriage would be preferable.<sup>271</sup> Moreover, a majority of the general public would apparently prefer to recognize the legality of civil unions at least partly for the reasons described above.<sup>272</sup> A well-functioning deliberative process would therefore simultaneously reject indefensible policy choices (e.g., the anti-recognition position) and choose from among the remaining options by reaching the best available accommodation of competing views

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270. The proper role of “disgust” or boundary maintenance in the law is the subject of an incipient literature. See Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005).

271. See ESKRIDGE & SPEDALE, *supra* note 235, at 17–18.

272. See AM. ENTER. INST. IN PUB. OPINION, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 27–28 (2004) (reporting survey results that consistently favor civil unions over legal recognition of same-sex marriage).

and interests under the circumstances—which could ultimately reflect the majority’s apparent preferences.

Thus far, this section has concluded that a well-functioning deliberative lawmaking process would lead to the adoption of registered partnerships or civil unions for same-sex couples at this time. Nonetheless, with a few exceptions, this is not what has occurred to date in the United States.<sup>273</sup> Instead, most states have enacted ballot initiatives or other laws that preclude the legal recognition of same-sex marriage and appear to foreclose the creation of registered partnerships or civil unions as well.<sup>274</sup> What is the appropriate role of the judiciary when reasoned deliberation on an important policy issue has so evidently failed within democratic lawmaking institutions?

This is, of course, a very hard question that lies at the crux of public law in a democracy. My view is that it would not be *illegitimate* for courts to invalidate legal prohibitions of same-sex marriage on constitutional grounds in light of the preceding analysis. This is particularly true when those laws were enacted pursuant to ballot initiatives, where the deliberative shortcomings of the lawmaking process are so readily apparent.<sup>275</sup> On the other hand, judicial decisions of this nature need not require state officials to recognize the legality of same-sex

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273. See Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 257 (2006) (“So far, only Massachusetts permits same-sex marriage, Vermont and Connecticut provide for ‘civil unions,’ some states provide for registered domestic partnerships, and a number of other states extend benefits to domestic partners, without however giving that partnership a particular legal status.”). The Supreme Court of California recently held that its state Constitution guarantees the basic civil right of marriage “to *all* individuals and couples, without regard to their sexual orientation.” *In re Marriage Cases*, 183 P.3d 384, 427 (Cal. 2008) (emphasis added); see also *Kerrigan v. Comm’r of Pub. Health*, 957 A. 2d 407, 418 (Conn. 2008) (holding that state laws that restricted civil marriage to heterosexual couples violated the equal protection rights of same-sex couples under the state constitution). The California decision was recently overruled by the enactment of Proposition 8 pursuant to the ballot initiative process. See *Gay Rights Hit Hard at Polls*, *NEWSDAY*, Nov. 6, 2008, at w17.

274. See *supra* notes 232–33 and accompanying text; see also Hay, *supra* note 273, at 276 (“[S]tate law in some forty states, by statute, constitutional provision, or judicial interpretation of existing marriage laws forbids same-sex marriage or civil union and denies recognition to such relationships formalized elsewhere.”).

275. For arguments that the validity of ballot initiatives of this nature should be reviewed more stringently than ordinary legislation by the courts in circumstances of this nature, see Eule, *supra* note 41, at 1558–59; and Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 21 (1993).



marriage. Rather, the court could invalidate legal prohibitions on same-sex marriage or restrictions on the benefits and obligations of marriage to opposite-sex couples, and “remand” the matter to the legislature for additional deliberation on the appropriate remedy.<sup>276</sup> This approach, which was followed in Vermont,<sup>277</sup> would simultaneously reverse the “burden of inertia” that makes it difficult to enact new legislation that dramatically changes the status quo (even when it is supported by a majority—as may be the case for civil unions),<sup>278</sup> facilitate reasoned deliberation among interested citizens and lawmakers regarding the best available solution, and perhaps lead to the legal recognition of civil unions instead of same-sex marriage.<sup>279</sup> As explained above, this is the solution that should probably have emerged from a well-functioning deliberative lawmaking process in the first place.

Indeed, the same-sex marriage controversy illustrates one of the greatest benefits of judicial review from the standpoint of deliberative accountability. If everyone knows that the preferences of a majority will ultimately prevail regardless of the validity of the underlying reasons for a policy decision, some participants in the lawmaking process would have little incentive to engage in reasoned deliberation with their opponents on particularly divisive issues.<sup>280</sup> If, however, everyone knows that the validity of the resulting decision will be subject to a form of judicial review that evaluates the strength of the underlying reasons for a decision, proponents of competing positions will have incentives to set forth public-regarding reasons for their views as persuasively as possible.<sup>281</sup> When no persuasive rea-

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276. See ESKRIDGE & SPEDALE, *supra* note 235, at 238–39 (advocating an incremental approach to the legal recognition of same-sex marriage, but endorsing the approach taken by the Vermont Supreme Court).

277. See *Baker v. State*, 744 A.2d 864, 886–88 (Vt. 1999).

278. See *supra* note 272 and accompanying text.

279. *Cf. Jacobi, supra* note 231, at 239 (claiming that by remanding its decision to invalidate the state’s legal prohibition of same-sex marriage to the legislature, the Massachusetts Supreme Court was able to give lawmakers an incentive to provide legal recognition to civil unions and reduce public opposition to same-sex marriage).

280. See John Ferejohn, *Instituting Deliberative Democracy*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 75, 94 (Ian Shapiro & Stephen Macedo eds., 2000) (“[D]eliberation takes place against a background of common understandings about what will occur following the formation of, or the failure to form, a deliberative consensus.”).

281. Hard-look judicial review of agency decisions can be understood in a similar fashion. *Cf. Seidenfeld, supra* note 95, at 1541–50 (explaining that from a civic republican perspective, judicial review of administrative action

sons for a given policy choice exist, it should be invalidated by a court that gives a reasoned explanation for its decision. This practice promotes deliberative accountability at several stages of the American public law system.

### CONCLUSION

In addition to demonstrating some of the tangible implications of a shift in the prevailing paradigm of democratic accountability, the same-sex marriage controversy illustrates a broader point about the way in which claims about political accountability are regularly employed in modern public law. In particular, the idea that policy decisions are legitimated solely by virtue of the fact that they were enacted pursuant to direct democracy or by elected representatives and therefore presumably reflect the majority's will typically plays a rhetorical function that avoids (and may be designed to avoid) the need to justify the underlying policy on the merits. If legal prohibitions on same-sex marriage are indefensible on the merits, the best available strategy for defending this policy may be to change the subject to the widely recognized need to respect the will of the people by deferring to the choices of politically accountable officials. Even when a policy choice is debatable, the advocates of the prevailing policy may prefer to rest their case on the need to defer to the legitimate choices of a majority, rather than engage with their opponents in a mutually respectful discussion of the substantive merits of an issue. In short, advocates of the political accountability paradigm may invoke this rhetoric as a strategic substitute for defending the merits of a policy decision, which they undoubtedly favor on other grounds.<sup>282</sup> The irony is that while reason-giving is often criticized as a mechanism of accountability because participants in the lawmaking process may not give candid reasons for their positions, arguments for political accountability are often pretext for what is truly motivating a discretionary policy choice.

Nonetheless, pretextual arguments can often be debunked through a process of reasoned deliberation. In this spirit, this

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"would become a meaningful dialogue between court and agency in which the court stands in for the knowledgeable citizen that the agency must persuade to accept the regulatory policy"); *supra* note 166 and accompanying text.

282. Cf. Friedman, *Academic Obsession*, *supra* note 21, at 156–57 (claiming that "the countermajoritarian difficulty that obsesses the legal academy is not some timeless problem grounded in immutable truths" but rather "it represents—as it almost always has—a need to justify present-day political preferences in light of an inherited intellectual tradition").

Article has explained that elected officials are not politically accountable for their specific policy decisions in the manner that is typically envisioned by contemporary public law theory. Moreover, it has claimed that public officials in a democracy can be held deliberatively accountable for their decisions and developed an alternative paradigm. Finally, it has argued that the deliberative accountability paradigm should be made paramount in American public law and explained some of the theoretical and doctrinal implications of doing so. Most notably, discretionary policy decisions in a democracy would need to be defended on the merits, rather than by relying upon rhetoric about the need to defer to the decisions of officials who are “politically accountable”—which, as we have seen, is mostly false.